

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN THE MATTER OF, Case No. 13-53846
Detroit, Michigan
CITY OF DETROIT, MICHIGAN December 18, 2013
_____/ 9:01 a.m.

IN RE: MOTION OF THE DEBTOR FOR A FINAL ORDER PURSUANT TO 11
USC SECTIONS 105, 362, 364(c)(1), 364(c)(2), 364(e), 364(f),
503, 507(a)(2), 904, 921, AND 922(I) APPROVING POST-PETITION
FINANCING, (II) GRANTING LIENS AND PROVIDING SUPERPRIORITY
CLAIMS STATUS AND (III) MODIFYING AUTOMATIC STAY (DKT #1520)
MOTION OF THE DEBTOR FOR ENTRY OF AN ORDER (1) AUTHORIZING THE
ASSUMPTION OF THAT CERTAIN FORBEARANCE AND OPTIONAL
TERMINATION AGREEMENT PURSUANT TO SECTION 365(a) OF THE
BANKRUPTCY CODE, (II) APPROVING SUCH AGREEMENT PURSUANT TO
RULE 9019, AND (III) GRANTING RELATED RELIEF (DKT #17)
CORRECTED MOTION FOR ENTRY OF AN ORDER (I) AUTHORIZING THE
ASSUMPTION OF THAT CERTAIN FORBEARANCE AND OPTIONAL
TERMINATION AGREEMENT PURSUANT TO SECTION 365(a) OF THE
BANKRUPTCY CODE (II) APPROVING SUCH AGREEMENT PURSUANT TO RULE
9019, and (III) GRANTING RELATED RELIEF (Dkt #157)
BEFORE THE HONORABLE STEVEN W. RHODES
TRANSCRIPT ORDERED BY: STEPHEN GROW, ESQ.

APPEARANCES:

For the City of Detroit, MI: CORINNE BALL, ESQ.
Jones, Day
222 East 41st Street
New York, NY 10017-6702
212-326-3939

JEFFREY ELLMAN, ESQ.
Jones, Day
1420 Peachtree Street, N.E.
Suite 800
Atlanta, GA 30309-3053
404-521-3939

ROBERT HAMILTON, ESQ.
Jones, Day
325 John H. McConnell Blvd.
Suite 600
Columbus, OH 43216-5017
614-469-3939

1 GEOFFREY IRWIN, ESQ.
2 GEOFFREY STEWART, ESQ.
3 GREGORY SHUMAKER, ESQ.
4 THOMAS CULLEN, JR., ESQ.
5 Jones, Day
6 51 Louisiana Avenue, N.W.
7 Washington, D.C. 20001-2113
8 202-879-3939

9 BRAD ERENS, ESQ.
10 Jones, Day
11 77 West Wacker
12 Chicago, IL 60601-1692
13 312-782-3939

14 For State of Michigan:

15 STEVEN HOWELL, ESQ. (P28982)
16 Special Assistant Attorney
17 General
18 Dickinson, Wright
19 500 Woodward Avenue
20 Suite 4000
21 Detroit, MI 48226-3425
22 313-223-3033

23 For Bank of America and
24 Merrill Lynch Capital
25 Services:

MARK ELLENBERG, ESQ.
Cadwalader, Wickersham & Taft
700 Sixth Street, N.W.
Washington, D.C. 20001
202-862-2200

HOWARD HAWKINS, ESQ.
Cadwalader, Wickersham & Taft
One World Financial Center
New York, NY 10281
212-564-6000

For UBS AG:

JARED CLARK, ESQ.
EDWIN SMITH, ESQ.
Bingham, McCutchen
399 Park Avenue
New York, NY 10022-4689
212-705-7000

1	For Syncora Holdings, Ltd.,	STEPHEN HACKNEY, ESQ.
	Syncora Guarantee, Inc., and	WILLIAM ARNAULT, ESQ.
2	Syncora Capital Assurance,	RYAN BLAINE BENNETT, ESQ.
	Inc.:	Kirkland & Ellis
3		300 North LaSalle
		Chicago, IL 60654
4		312-862-2000
5	For the Ad Hoc COPS Holders:	DEBORAH FISH, ESQ. (P36580)
		Allard & Fish
6		2600 Buhl Building
		535 Griswold
7		Detroit, MI 48226
		313-961-6141
8		
9		THOMAS MOERS MAYER, ESQ.
		Kramer, Levin, Naftalis &
		Frankel
10		1177 Avenue of The Americas
		New York, NY 10036
11		212-715-9100
12	For General and Police and	JENNIFER GREEN, ESQ. (P69019)
	Fire Retirement Systems:	Clark, Hill, PLC
13		500 S. Woodward Avenue
		Suite 3500
14		Detroit, MI 48226
		313-965-8300
15		
16	For Erste Europäische	VINCENT MARRIOTT, III, ESQ.
	Pfandbrief and	Ballard, Spahr
	Kommunalkreditbank	1735 Market Street
17	Aktiengesellschaft in	Philadelphia, PA 19103
	Luxemborg, S.A.:	215-665-8500
18		
19	For Interested Party David	JEROME GOLDBERG, ESQ. (P61678)
	Sole:	Jerome Goldberg, PLLC
20		2921 East Jefferson
		Suite 205
21		Detroit, MI 48207
		313-393-6001
22	For Financial Guaranty	ALFREDO PEREZ, ESQ.
	Insurance Company:	Weil, Gotshal & Manges, LLP
23		700 Louisiana Street
		Suite 1600
24		Houston, TX 77002
		214-746-7700
25		

1 For Ambac Assurance CORPORATION: CAROLINE TURNER, ENGLISH, ESQ.
2 Arent, Fox, LLP
3 1717 K Street, N.W.
Washington, D.C. 20036-5342
202-857-6000

4 For U.S. Bank as Trustee DAVID LEMKE, ESQ.
5 For Water and Sewer Bonds: Waller, Lansden, Dortch & Davis
6 Nashville City Center
7 511 Union Street
Suite 2700
Nashville, TN 37219
615-244-6380

8 For FMS Wertmanagement: RICK FRIMMER, ESQ.
9 Schiff, Hardin, LLP
233 South Wacker Drive
Suite 6699
10 Chicago, IL 60606-6473
312-258-5500

11 For the Detroit Retired RYAN PLECHA, ESQ. (P71957)
12 City Employees Association, Lippitt, O'Keefe
Retired Detroit Police and 370 East Maple Road
13 Fire Fighters Association, 3rd Floor
Shirley V. Lightsey, and Birmingham, MI 48009
14 Donald Taylor (Retiree 248-646-8292
Association Parties):

15 Court Recorder: Letrice Calloway

16 Transcriber: Deborah L. Kremlick

17
18
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1 (Court in Session)

2 THE CLERK: All rise. Court is in session. Please
3 be seated. Case number 13-53846, City of Detroit, Michigan.

4 THE COURT: Good morning. One moment, please. Sir.

5 MR. ERENS: Good morning, Your Honor. Again Brad
6 Erens on behalf of the City of Detroit.

7 If it please the Court, we thought before we went on the
8 clock this morning we'd give the emergency loan board report
9 Your Honor asked for yesterday afternoon.

10 THE COURT: Yes.

11 MR. ERENS: Mr. Steve Howell of Dickinson, Wright is
12 here on behalf of the state and I'm going to have him give the
13 report.

14 THE COURT: Okay.

15 MR. ERENS: Thank you.

16 MR. HOWELL: Good morning, Your Honor. Steven G.
17 Howell, Dickinson, Wright appearing as Special Assistant
18 Attorney General on behalf of the state.

19 Your Honor, I understand there were questions that came
20 up yesterday and I'd like to address a couple of them that I
21 understand were raised. One is in terms of the members of the
22 board, emergency loan board, they are Kevin Clinton, State
23 Treasurer, John Nixon, Director of the Department of
24 Technology Management and Budget, and Steve Arwood, Director
25 of Licensing and Regulatory Affairs.

1 Your Honor, there is underway an effort to get a meeting
2 scheduled. There is 18 hours notice required under the Open
3 Meetings Act. We hope to have that meeting scheduled by the
4 -- either on Friday afternoon, or Monday. And that is the
5 soonest we can have it set up, Your Honor.

6 THE COURT: What is the nature of the loan board's
7 review?

8 MR. HOWELL: It's not real clear. The -- the
9 requirement -- the review is under the Home Rule Cities Act,
10 not under PA436. And it is simply a requirement that it
11 comply with the procedures and requirements of -- of the --
12 let me just read it for you if I could.

13 THE COURT: Okay, sure.

14 MR. HOWELL: And it's the Home Rule City Act 279,
15 Section 36(a)(2). Any financial recovery bonds issued under
16 this section are subject to the terms and conditions approved
17 by the local emergency financial assistant loan board created
18 under the Emergency Municipal Loan Act.

19 And that is the extent of the guidance in the statute.
20 It will be presented to them. They will ask whatever
21 questions they have and make their decision at that time.

22 THE COURT: Why wasn't this done before this
23 hearing?

24 MR. HOWELL: I think at the time I think their

1 that may come up in the course of this proceeding, in the
2 course of any negotiations, the Judge's ruling, that what we
3 would present to the emergency loan board would be that which
4 was final and concluded. Whether that was a correct judgment
5 with the benefit of hindsight, is another question. But that
6 was the thinking at the time that we would simply present what
7 was the final outcome as opposed to having to possibly go back
8 later if there were changes between what was approved earlier
9 and what ultimately --

10 THE COURT: Someone actually made the decision to
11 potentially risk wasting the Court's time and all of the
12 attorney fees in this case?

13 MR. HOWELL: That was -- that was certainly not --

14 THE COURT: Should the loan board decide not to
15 approve whatever loan this Court approves?

16 MR. HOWELL: That was not the intention, Your Honor.
17 The intention was not to show any disrespect to this Court.

18 THE COURT: Well, it's not -- of course it wasn't
19 your intention, but that's the risk, right?

20 MR. HOWELL: That is -- that is the risk. We are
21 hopeful that will not happen, but that -- that is a risk that
22 exists, Your Honor, I can't change that.

23 THE COURT: Well, let me just put it to you
24 directly. Is there any reasonable likelihood that the loan

25 board would not approve the loan after this Court approves it?
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1 MR. HOWELL: Well, the question will be presented
2 and needs to be made. That decision needs to be made in -- in
3 the meeting that is scheduled under the Open Meetings Act.
4 But I do not expect there -- we do not expect there to be an
5 issue, but that is -- that -- that decision has to be made at
6 that meeting at that time under the Open Meetings Act, Your
7 Honor.

8 THE COURT: Well, but -- okay. So suppose one or
9 more of the objecting parties here wish to address the loan
10 board with the same or perhaps even different issues on why
11 the loan board shouldn't accept it. Will -- will -- will that
12 be permitted?

13 MR. HOWELL: I suppose they -- I don't know the
14 procedure for presenting evidence at that hearing. I don't
15 know that there is a procedure for presenting evidence. But
16 if it is, I would -- I would expect that that board would be
17 before this Court.

18 THE COURT: I wasn't asking about evidence, I was
19 just -- that's another question. I was just asking about
20 whether parties are permitted to be heard on the issue of
21 whether the loan should be approved at that administrative
22 level.

23 MR. HOWELL: It is an open -- it is an open meeting
24 under the Open Meetings Act. So I suppose someone could come
25 in. I -- I do not expect the members as constituted of that

1 board to disregard the Court's view of this when -- when the
2 ruling is completed. And we are confident it will be -- be
3 approved, but we cannot say that or give any real guidance
4 prior to that meeting occurring.

5 THE COURT: Is it your recommendation that the Court
6 proceed?

7 MR. HOWELL: It is, Your Honor.

8 THE COURT: Thank you, sir.

9 MR. HOWELL: Thank you, Your Honor.

10 THE COURT: One more moment, please. At the
11 beginning of this case, I resolved to myself that I would
12 never have an off the record conversation with counsel because
13 the case is too public for that.

14 A circumstance, however, has arisen that has forced me to
15 reconsider that and so I want to see Ms. Ball and Ms. (sic)
16 Hackney at the side of the bench here right now.

17 (At Side Bar Off the Record at 9:09 a.m.; Resume at 9:10
18 a.m.)

19 THE COURT: All right. Let's proceed.

20 MR. HAMILTON: Good morning, Your Honor. Robert
21 Hamilton of Jones, Day on behalf of the City. We're going to
22 continue with the direct examination of -- of James Doak.

23 THE COURT: Sir, you are still under oath. You may
24 be seated.

25 THE WITNESS: Thank you.

1 (WITNESS JAMES DOAK WAS PREVIOUSLY SWORN)

2 DIRECT EXAMINATION

3 BY MR. HAMILTON:

4 Q Good morning, Mr. Doak.

5 A Good morning.

6 Q When we broke yesterday afternoon, evening we were on
7 City's Exhibit 88 which is the September 26th, 2013 financing
8 discussion dec that you testified you provided to Mr. Orr, the
9 City's CFO, and to then State Treasurer Andy Dillon. And we
10 were on the second page of the dec which is up there on the
11 screen.

12 And I wanted to ask you, the first two columns after all
13 the names of the alternative lenders has a column that CA sent
14 and CA signed. What does the CA refer to?

15 A That refers to confidentiality agreement. So the first
16 column is parties that received the confidentiality agreement
17 and then parties that returned it executed.

18 Q And then the next column is 9-6 check in. What is that?

19 A For parties that received the introductory packet at the
20 -- at the commencement of the process. We had asked them to
21 get back to us on the 6th of September to indicate whether they
22 were anticipating preparing a -- a term sheet or indication of
23 interest.

24 Q Okay. And then the next column has the label data room.

25 What is that?

1 A We anticipated at the outset of the process that some of
2 the parties may ask for access to a data room and we -- this
3 column was intended to track those that -- that were admitted
4 into the data room.

5 Q And if you go down to the -- the very bottom on that
6 column under the grand total which as I understand it combines
7 both the lenders on this page and the previous page, the
8 traditional lenders. It has a total of eight out of 50 with
9 access to the data room, is that right?

10 A That's correct.

11 Q Why such a small number?

12 A Of -- in the -- in the time frame of getting to the term
13 sheets, a number of the parties did -- did not request access
14 to the data room. In -- they felt that they could produce the
15 term sheet without access to the data room and as a result
16 only -- only eight subsequently entered the -- the data room.

17 Q Did they have discussions with you in -- in lieu of going
18 to the data room on other topics?

19 A Yes, they did. Most of our discussions with the parties
20 in advance of deliveries of the term sheet concerned
21 structuring of the -- structuring of the loan and the
22 provisions in the indicative term sheet. Parties were less
23 concerned with the financial and operational data that was in
24 the data room that the City operated.

25 Q Well, during those discussions with the lenders, both
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1 before the 26th and after the 26th, what was the most important
2 areas of concerns that were expressed by the lenders to you?

3 A The most -- the areas that were most frequently addressed
4 by the lenders were the state of the Chapter 9 filing and the
5 protections including collateral that the lenders would
6 receive in the -- in making the loan and how those protections
7 and collateral would be affected by various litigative
8 outcomes including the appeal of the Chapter 9 and a -- an
9 overturning of the -- the -- the Chapter -- Chapter 9 as well
10 as other issues associated with 436.

11 Q And when you say the appeal of Chapter 9, do you mean the
12 appeal of the eligibility ruling for Chapter 9?

13 A Yes. The lenders were concerned that the Court's
14 decision on the eligibility of the city would be overturned in
15 the appellate process and at that point they would have a -- a
16 loan agreement that would potentially have state -- state
17 components and federal components, but the federal components
18 could be viewed as being inactive or not part of their loan
19 any longer.

20 Q So how did the concern regarding loan structure and
21 collateral relate -- relate to the concern about the
22 possibility that the Chapter 9 eligibility ruling would be
23 reversed and this case would be dismissed? How did those two
24 relate?

25 A None -- none of the lenders felt comfortable in
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1 proceeding forward. None of them indicated to us that they
2 were -- were willing to proceed forward without -- and being
3 provided collateral and collateral that could be provided to
4 them under state law as well as -- as federal law.

5 MR. ARNAULT: Objection, Your Honor. That's
6 hearsay.

7 THE COURT: Overruled.

8 Q The last column on Page 2 of this dec is title -- not the
9 last column, second to last one is -- is term sheet. What
10 does that refer to?

11 A That refers to potential lenders who got back to us with
12 written indications of interest to participate in the
13 financing.

14 Q Now in the -- if you look at the very bottom on that
15 column, the grand total is 15 out of 50. Yet in the City's
16 motion and your declaration and -- and in some other testimony
17 we have indicated that we got a total of 16 term sheets, not
18 15. Why does that say 15 but elsewhere we say 16?

19 A Subsequent to the date of this document, CSG Investments
20 which also goes by the name Beal Bank in our process submitted
21 an indication of interest.

22 Q And they're the one that's close to the middle of the
23 page there on the alternative lender's side, right?

24 A That's correct.

25 Q Okay. All right. So if we then go to the next page of
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1 this exhibit, what does this page represent?

2 A This page represents the comparative economics of solely
3 the -- the swap termination portion of the post-petition
4 financing amongst the various parties.

5 Q And then the next page of the exhibit shows what?

6 A The next page shows the same mathematics for the quality
7 of life component of the facility.

8 Q And then Page 5 of the next page shows what?

9 A Page 5 shows the comparative economics of the proposal --
10 proposals that we received for the entire financing and for
11 the total facility.

12 Q Okay. Now there's a -- there's a black bar down the
13 middle of this chart. There's three potential lenders on the
14 left side of that -- of that black bar and there's five on the
15 right side. What's the significance of that black bar?

16 A At the time these were the three potential lenders that
17 we were recommending that we proceed forward with to
18 definitive commitment letters.

19 Q The three to the left of the bar?

20 A That's correct.

21 Q And why -- why were you recommending proceeding with
22 those three and not with the other five?

23 A We were recommending those three because of the -- their
24 -- all in terms of their -- their indicative term sheet,

25 including the -- the cost and other provisions as well as the
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1 strength of the institutions.

2 Q And if you'll look on the -- the -- under the Barclays
3 column, the second lender there to the left of the bar. If
4 you go down to the -- the bottom totals on the difference from
5 lowest all in rate and difference from lowest all in expense,
6 dashes there for Barclays. Why is that?

7 A Because this -- this row showed sort of distance off the
8 lead. And at this point Barclays was the lead and that they
9 were the lowest all in rate provider of financing.

10 Q All right. Now does this all in cost analysis reflect
11 the market flex provision that ultimately ended up in the
12 Barclays facility?

13 A No. No, it does not.

14 Q Why not?

15 A Because at -- at this time the indicative term sheet that
16 they provided us did not have a market flex provision.

17 Q All right. After you recommended to the -- I assume you
18 made your recommendation to Mr. Orr, the emergency manager.
19 I'm assuming the three to the left of the bar, is that right?

20 A Yes, we did.

21 Q All right. After you made that recommendation, what did
22 you do?

23 A We -- we indicated to those three institutions that we
24 would like to see from them definitive executable commitment

25 letters on -- on the lines of their indicative term sheets.

1 Q And did you go after anybody else other than those three?

2 A Subsequently we incorporated the syndicate of lenders led
3 by Carval which is the next -- the next column over.

4 Q Why did you decide to do that?

5 A Because we were not confident we would get to acceptable
6 commitment letters from all three of the -- the lenders. We
7 had issues with -- individual issues with all of them, but --
8 but significant issues with Bank of America and with -- and
9 with Goldman.

10 Q And so what were you -- what was your concern then as to
11 why -- why you needed to get someone else in -- in -- in the
12 room?

13 A Our -- our concern was we were headed towards a one horse
14 race and that would give us very limited flexibility in case
15 for some reason we were not able to arrive at acceptable terms
16 with Barclays and recognizing that Carval was a close fourth.
17 We incorporated them back into the process.

18 Q Let me ask you now about City Exhibit 89.

19 MR. HAMILTON: And this too, Your Honor, is already
20 in evidence because it was not objected to.

21 Q What is this document, Mr. Doak?

22 A This was the briefing materials that we provided to the
23 emergency manager and -- and others providing the real time
24 status update on negotiating commitment letters and -- and the
25 form of the definitive commitment letters that we got back.

1 from the four lead potential lenders.

2 Q Did you also give this to then State Treasurer Andy
3 Dillon?

4 A Yes. The -- the working group was -- was the same set of
5 individuals.

6 Q As the previous dec?

7 A As the previous dec. The Director of Michigan Finance
8 Authority, the Treasurer, CFO, other members of the EM staff.

9 Q All right. So if we go to the next page of this exhibit
10 which is Page 1 of the dec.

11 A This is a comparison of the principal economic terms of
12 Barclays and Carval which were at that time developing into
13 our two lead potential commitment letters.

14 Q And then on Pages 3 and 4 you got the same discussion
15 with respect of Bamil and Goldman Sachs, is that right?

16 A That's correct.

17 Q All right. Go back to Page 1. Under the Barclays
18 columns, halfway down there's a thing for market flex. We now
19 have information there on the market flex. Why is that?

20 A In their definitive commitment letters, Barclays
21 incorporated in market flex terms into what they -- into their
22 overall commitment.

23 Q Okay. If we load to Page 5 of this exhibit, the one
24 that's labeled 5, what is this?

25 A This is a -- this is a comparison of all in cost analysis
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1 of the state of the four proposals. And for Barclays and for
2 Goldman Sachs. Both of those institutions anticipated
3 syndicating a portion of the loan subsequently. So both of
4 them incorporated in market flex provisions to their -- their
5 commitment. So we ran those proposals both at their, you
6 know, starting no flex point and also at their max flex point.

7 Q All right. If you go down to the very bottom, there's a
8 total annual expense row. What's that?

9 A Total annual expense was our mathematics for taking the
10 all in rate and incorporating in all of the fees associated
11 with the transaction as well as the interest rate and
12 calculating over a two year period what the raw dollar cost
13 would be of each one of these commitment proposals.

14 Q All right. And so if you look for under the max -- max
15 flex column for Barclays you get a total annual expense
16 calculation of 26.3, I assume that's million, is that right?

17 A Yes.

18 Q All right. And that's lower than all the other figures
19 to the right, is that correct?

20 A That's correct.

21 Q So even if you get the max max max market flex for
22 Barclays it's still less expense to the City than the others?

23 A That's correct, yes. That was our conclusion.

24 Q All right. This is dated -- this -- this dec is dated

1 Is that Thursday?

2 A That was Thursday morning.

3 Q What happened on Friday and over the weekend?

4 A Friday and over the weekend, we negotiated with Barclays
5 and their representatives to come to a final form of
6 commitment letter. We also engaged in dialogue -- you know,
7 dialogue with Carval in regards to furthering on their --
8 their commitment as well.

9 Q All right. And did Barclays send you its commitment
10 letter, signed by the Barclays representative on Sunday the
11 6th?

12 A Yes. At each stage of the process we asked Barclays to
13 -- to bring down their commitment letter and provide us with a
14 executed copy. This is our way making sure in our process
15 that what we had from them was what they were willing to sign.

16 Q Now did Mr. Orr sign the document on Sunday evening the
17 6th when you got the signed ones, the signed letter from
18 Barclays?

19 A No, he did not.

20 Q All right. What did you do on Monday the 7th?

21 A On Monday the 7th, I met -- I start -- I met with members
22 of city council on a one on one basis to brief them on the
23 post-petition financing process and the fact that we would be
24 coming to them shortly with a financing proposal.

25 Q All right. And did you meet with each individual member

1 of the city council on Monday and Tuesday of that week?

2 A Yes, I met with each member of city council on -- on
3 Monday and Tuesday, most on Monday.

4 Q Was that just one meeting or was it individual meetings
5 with each one?

6 A It was individual meetings with each one of the city
7 council members, all six.

8 Q And in those individual meetings with each individual
9 member of the city council, did you provide them with any
10 written materials to explain the process in the terms of the
11 commitments that you had received?

12 A Yes, we did. Or yes, I did.

13 Q All right. I'd like to ask you about City Exhibit 90,
14 Mr. Doak. What is this document?

15 A The -- this is the presentation, the physical briefing
16 materials that I provided to each member of the city council
17 in the one on one meetings that I held with them on October 7th
18 and October 8th.

19 (City's Exhibit 90 was identified)

20 Q And did you discuss the contents of this document with
21 each member of the city council?

22 A Yes, I did.

23 Q During those meetings?

24 A Yes, I did.

1 move Exhibit 90 into evidence.

2 THE COURT: Any objections? It is admitted.

3 (City's Exhibit 90 was admitted)

4 Q If you'll look at what's numbered Page 4 on this dec,
5 which makes it the fifth page in, next page. There you go.

6 If you look at the bullet that starts with this confidential
7 process. Do you see that, Mr. Doak?

8 A Yes.

9 Q Could you read that, please?

10 A This confidential process resulted in a competitive
11 financing commitment on the most favorable terms available in
12 the market.

13 Q What were you referring to with the phrase, a competitive
14 financing commitment in this bullet?

15 A I was referring to the -- the -- the deal that we -- we
16 had in hand from Barclays.

17 Q If we turn to the next page of the exhibit, what does
18 this page show?

19 A This page shows the savings, the opportunity to the City
20 from -- from moving forward with the -- with the termination
21 of the swaps and putting in place the post-petition financing.

22 Q All right. And in the middle column it says annual cost
23 of -- of swap termination load. And then in Italics it says,
24 indicative all in interest rates. Do you see that?

25 A Yes.

1 Q What -- what did you tell the city council members was
2 meant by indicative all in interest rates?

3 A I -- we told them that indicative all in interest rates
4 was meant to represent both the interest rate components which
5 could be a base rate plus a -- plus a -- plus a lift. As well
6 as the fees associated with the deal. So it's consistent with
7 the all in economics concept.

8 Q So it includes both the potential interest rates and the
9 fees involved with the loans, is that correct?

10 A That's correct.

11 Q All right. How did you -- why did you choose the ranges
12 that are in here 5 to 9% to discuss with the members of city
13 council?

14 A I chose the -- the ranges here because I knew that the
15 financing proposal that we had was well within the bounds of
16 this range and I could represent to council members that the
17 financing proposal that we had was within this range without
18 disclosing the specific economics.

19 Q All right. So earlier you said it was the interest rate
20 plus a lift is the term you used. Did you tell each
21 individual council member that there was a market flex
22 provision in the commitment?

23 A I -- I -- I don't recall whether I discussed market flex
24 with them at -- at this time.

25 Q But you did tell them that the potential interest rate
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1 all in would be somewhere in the range of 5 to 9%, is that
2 right?

3 A Yes. I told -- I told them that this range was a -- was
4 an appropriate range and the financing was going to be well
5 within this -- the range that was presented to them.

6 Q All right. I'd like now to ask you, Mr. Doak, about City
7 Exhibit 96. Are you familiar with this document, Mr. Doak?

8 A Yes.

9 Q What is it?

10 A This is the letter from Kevyn Orr to then Treasurer Andy
11 Dillon requesting his approval as is required under 436 for
12 Kevyn to execute the commitment letter, the Barclays
13 commitment letter to proceed forward with the financing.

14 (City's Exhibit 96 was identified)

15 Q And was this document actually sent to Treasurer Dillon?

16 A Yes, it was.

17 MR. HAMILTON: Okay. Your Honor, the City would
18 move Exhibit 96 into evidence.

19 THE COURT: Any objections? It is admitted.

20 (City's Exhibit 96 was admitted)

21 Q Did you have -- and if we look -- if you'll look at the
22 third page of this exhibit. And this is an attachment to what
23 the letter that was sent to Mr. Dillon, is that right?

24 A Yes.

25 Q And what is this document?

1 A This is the -- this is the fee letter which is one
2 component of the documentation that we were required to
3 execute at that time to proceed forward.

4 Q If you'd go to Page 5 of that fee letter. You'll see --
5 go back one, please. There -- this -- this fee letter is
6 signed by Barclays, is that right?

7 A Yes, it is.

8 Q By Gerbino?

9 A Yes.

10 Q And it's not signed yet by -- by Mr. Orr on behalf of the
11 City of Detroit, is that right?

12 A That's correct.

13 Q And then the next document that's attached is what is
14 that? The next -- there we go. What is that?

15 A This is the commitment letter for the financing.

16 Q And if you go to the last page of that document which is
17 Page 10, the signature page, you'll see that one is signed
18 also by Barclays?

19 A Yes.

20 Q But not yet signed by Mr. Orr, is that correct?

21 A That's correct.

22 Q And this is on Tuesday the 8th when it was sent to Mr.
23 Dillon?

24 A That's -- yes.

25 Q All right. Did you have a discussion with Mr. Dillon
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1 about this document, this package on Thursday evening the --
2 the 10th?

3 A Yes, we did.

4 Q And I'd now ask you to look at City Exhibit 97. What is
5 this document, Mr. Doak?

6 A This is the response that we received from Treasurer
7 Dillon coming out of the prior night's conference call when we
8 asked for his approval for Kevyn Orr to execute the commitment
9 documentation for the Barclays loan and --

10 (City's Exhibit 97 was identified)

11 Q Is this document Mr. Dillon's approval of the loan and
12 the -- and authorization for the City to enter into the
13 commitment?

14 A Yes.

15 MR. HAMILTON: Your Honor, the city would move City
16 Exhibit 97 into evidence.

17 THE COURT: Any objections? It is admitted.

18 (City's Exhibit 97 was admitted)

19 Q And again this exhibit is dated October 11th, that's
20 Friday, right?

21 A Yes.

22 Q All right. So let's look at City Exhibit 94 then. This
23 is a copy of the commitment letter from Barclays, right?

24 A Yes.

25 (City's Exhibit 94 was identified)

1 Q And if you look at the signature -- signature page which
2 is ten pages in, I believe, right there. We see that it's
3 executed by Kevyn Orr on behalf of the City of Detroit, is
4 that right?

5 A Yes.

6 Q When did Mr. Orr sign this document?

7 A He signed it on the 11th.

8 Q After you received the approval from Mr. Dillon?

9 A Yes.

10 MR. HAMILTON: And, Your Honor, Exhibit 94 is
11 already into evidence, it wasn't objected to.

12 THE COURT: Thank you.

13 Q Mr. Doak, could you explain to the Court why the City
14 agreed -- why it entered into the commitment letter and agreed
15 to pay the commitment fee to Barclays before it obtained
16 approval from the Bankruptcy Court of this transaction?

17 A We -- we moved forward with executing the commitment
18 letter because it was an integral part of the overall Barclays
19 financing. And it was -- which was the lowest overall cost to
20 the city. And we were -- would not have the ability to
21 proceed forward with negotiating definitive documentation with
22 Barclays unless we executed the commitment letter.

23 Q Why did the city --

24 MR. HAMILTON: Your Honor, I -- I misspoke. There

25 was an objection to Exhibit 94 which was the signed commitment
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1 letter. The objection was that it's duplicative. We couldn't
2 find it elsewhere, so we don't think it's duplicative. But I
3 misrepresented it, it has not been entered into evidence yet.
4 So we would move it into evidence.

5 THE COURT: Thank you. Any objections? Let's just
6 restate for the record what Exhibit 94 is.

7 MR. HAMILTON: Is -- Exhibit 94, Your Honor, is the
8 commitment fee letter that is executed by both Barclays and by
9 Mr. Orr on behalf of the City of Detroit.

10 THE COURT: Thank you. Any objections?

11 MR. MARRIOTT: I want to just clarify the commitment
12 fee letter, or the commitment letter?

13 MR. HAMILTON: It's titled commitment letter. The
14 fee letter is a separate document.

15 MR. MARRIOTT: Right. Okay, I just wanted to
16 clarify. No objection.

17 THE COURT: It is admitted.

18 (City's Exhibit 94 was admitted)

19 Q Mr. Doak, can you explain to the Court why the city
20 ultimately decided to select Barclays over all the other
21 potential lenders? What's -- what's advantageous about the
22 Barclays financing facility?

23 A The -- the Barclays facility was advantageous over the
24 others because it presented the city with the best overall
25 economics and it was a -- and it was a fully underwritten

1 commitment by a major financial institution that we felt
2 confident would be able to complete the transaction.

3 In addition the other terms that Barclays negotiated for
4 in our process were ones that we felt we were capable of
5 performing -- performing on in the time allotted. That
6 includes the collateral provisions that they -- that they
7 requested.

8 Q What was particularly attractive about the collateral
9 provisions in the Barclays financing proposal that you
10 ultimately were able to negotiate?

11 A The -- the Barclays proposal worked with the indicative
12 term sheet that we provided and was -- and they were willing
13 to move forward with the -- the limited collateral interest
14 that we suggested that the lenders would receive on gaming
15 revenue and income tax revenue.

16 The other proposals that we received most -- all the
17 other proposals were -- were much more complex in regards to
18 what collateral interest parties were looking for.

19 Q And under the Barclays proposal that you were able to
20 negotiate, what happens with respect to the collateral if the
21 city is unable to get exit financing and the city ends up
22 defaulting at the end of the term of this loan?

23 A The -- Barclays has limited rights under the documents to
24 -- to utilize up to \$4,000,000 a month of gaming tax revenues
25 and \$4,000,000 a month of income tax revenues to pay default

1 interest and amortize their position down. They -- they don't
2 have -- they don't have more expansive rights to the tax
3 streams of the city.

4 Q So they can't -- can Barclays if -- if the city defaults,
5 can Barclays demand immediate payment of the entire
6 outstanding balance in full and collect the collateral to do
7 that?

8 A No, that's -- that's not within their rights under the
9 documents.

10 Q All right. And is the city confident that in the event
11 it defaults, can't obtain exit financing, it will be able to
12 afford the amortized pay down of the loan in a default status
13 going forward?

14 A It will require some very difficult choices, but the --
15 but the city is -- is confident that it can -- it can still
16 operate and perform under those terms.

17 Q If I could ask you, sir, now to look at City Exhibit 98.

18 MR. HAMILTON: And again, Your Honor, this is a
19 document that is -- that is already in evidence because it was
20 not objected to.

21 Q Mr. -- Mr. Doak, can you tell us what this document is?

22 A This is the submission of the post-petition financing to
23 -- to the city council.

24 Q Was this document in fact -- and its attachments provided
25 to the city council?

1 A Yes, it was.

2 Q Okay. And then if I could ask you, sir, what happened
3 after you submitted the -- the package that included the --
4 the financing proposal and the related letters? What happened
5 with respect to the city council after you submitted them?

6 A The city council requested a -- a briefing on the -- on
7 the post-petition financing, so we -- and we provided them
8 with a closed meeting briefing in the subsequent week.

9 Q And did you attend that meeting?

10 A Yes, I did.

11 Q And did you physically provide them with the dec that
12 they requested?

13 A Yes. We -- we provided them with briefing materials in
14 the context of that meeting.

15 Q All right. If I can ask you, sir, to look at City
16 Exhibit 91. What is this document?

17 A These are the briefing materials that we provided to city
18 council in their closed session on the afternoon of October
19 17th.

20 (City's Exhibit 91 was identified)

21 MR. HAMILTON: Okay. Your Honor, the -- the city
22 would move Exhibit 91 into evidence.

23 THE COURT: Any objections?

24 MR. MARRIOTT: Your Honor, no objection to admission

25 of this exhibit for purposes of indicating what was provided
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1 to city council. There are projections on the back that we
2 lodged objections to yesterday as to their relevance and
3 whether they should be admitted for the truth of the material
4 information contained therein. But as to -- to the extent the
5 city, and I assume this is true, was using this exhibit for
6 purposes of showing what was provided to city council, no
7 objection.

8 THE COURT: Is that the purpose of the exhibit, sir?

9 MR. HAMILTON: That is correct, Your Honor.

10 THE COURT: All right. For that limited purpose,
11 Exhibit 91 is admitted.

12 (City's Exhibit 91 was admitted)

13 Q Mr. Doak, if you'll look at Page 6 of this dec. Under
14 the -- in the row that's got the heading of pricing, second
15 from the bottom. The second bullet refers to the market flex
16 provision, or market flex provisions. Do you see that?

17 A Yes.

18 Q What was -- what was discussed with council in the closed
19 session on the 17th regarding this -- this provision?

20 A We informed them that there was a -- there was a market
21 flex provision in the -- in the Barclays commitment that gave
22 Barclays the -- the flexibility within specific limits to
23 modify the -- the interest rate component of the -- the
24 financing in order to syndicate out a -- a given portion of
25 the overall loan.

1 Q During that closed session, did you expressly state what
2 the maximum cap was on the market flex?

3 A No, we did not.

4 Q Why not?

5 A Because that's the -- because it was important to not
6 convey the market flex including what the max is in a -- in a
7 forum that could eventually be public because that would
8 defeat the -- the purpose of having the -- the -- the market
9 flex provision. Financing would likely move to the -- to the
10 all in rate.

11 Q Now had you already discussed with each of the individual
12 city council members what the interest -- potential interest
13 rate range would be as a result of the market flex?

14 A In -- in the one on one sessions with the council
15 members, for those who -- who asked about the pricing, we --
16 we had conveyed that the -- that the commitment was -- was
17 well within the range that we had provided which was the 5% to
18 the -- to the 9%.

19 Q Okay. Did you also discuss at the closed session with
20 city council, the commitment fee that the city had agreed to
21 pay to -- to Barclays?

22 A Yes, we did.

23 Q Did you disclose the amount of that fee during your
24 discussions?

25 A Yes, we did.

1 Q What happened after the closed session with city council?
2 What did city council do?

3 A City council provided us with a -- the staff provided us
4 with a list of questions that we had to respond to over the
5 weekend.

6 Q And after you responded to those questions what did the
7 council do?

8 A The council subsequently did not approve the -- the
9 post-petition financing.

10 Q Is city council approving -- is city council approval of
11 the facility a condition, a closing condition to the facility?

12 A No.

13 Q Do you have an understanding as to why it's not a
14 condition to closing?

15 A The state public law 436 provides for how the City of
16 Detroit operates in the -- in the installation of emergency
17 manager. And subsequent to a disapproval by city council
18 there is an opportunity for them to provide an alternative and
19 then from there there is a -- there is an emergency loan board
20 decision that can be made to determine what goes forward.

21 Q Mr. Doak, do you have an opinion as to whether based on
22 the process that you -- you employed and directed, whether or
23 not the post-petition financing facility that the city has
24 agreed to with Barclays, has been substantially and adequately
25 tested by the market?

1 A Yes, I do.

2 Q What is your opinion?

3 A My opinion is that the Barclays financing is the best
4 available to the city under present circumstances and it has
5 been adequately and appropriately tested by a robust
6 competitive and market based solicitation process.

7 Q And is it your opinion it's the best facility available
8 to the city even if the maximum market flex provision is --

9 THE COURT: Would you not ask a leading question on
10 this point?

11 MR. HAMILTON: Sure.

12 Q Do you have an opinion as to whether or not this facility
13 is the best available to the city even if the market flex
14 provision is fully implemented?

15 A Yes.

16 Q What is your opinion?

17 A My opinion is that even if the market flex provision is
18 fully executed, this is the -- this is the best available
19 financing to the city right now given the circumstances and we
20 have the benefit of knowing from a very competitive process of
21 soliciting a -- from a wide range of financing providers what
22 other economics and associated terms was available. And I'm
23 confident that even with market flex, no party was -- was
24 willing to provide comparative overall and better terms.

25 Q And Mr. Doak, do you have an opinion as to whether

1 unsecured financing is available to the city in this Chapter 9
2 case?

3 A Yes, I do.

4 Q What's your opinion?

5 A My opinion is that unsecured financing is not available
6 to the City of Detroit at this time given its current
7 circumstances.

8 MR. HAMILTON: I have no further questions, Your
9 Honor.

10 CROSS EXAMINATION

11 BY MR. ARNAULT:

12 Q Good morning, Mr. Doak. How are you?

13 A Good morning.

14 Q Again, my name is Bill Arnault and I represent Syncora.
15 I'd like to begin by discussing the initial proposal that you
16 sent out to prospective lenders regarding the DIP financing.
17 So the initial proposal that you sent out contemplated that
18 the DIP financing would be secured, correct?

19 A Yes.

20 Q And the collateral that the city included in its initial
21 proposal was income tax revenue, asset proceeds, and the
22 casino revenues, correct?

23 A Yes.

24 Q And you would agree with me -- agree with me that it

25 would be unlikely that a potential lender would remove
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1 protections that went out with the city's initial proposal,
2 right?

3 A I would agree.

4 Q And as part of this solicitation process, you did not
5 send out a solicitation document that asked parties to return
6 bids for unsecured financing, right?

7 A No, we did not.

8 Q And you did not personally ask any prospective lender if
9 it would make the DIP loan on an unsecured basis, right?

10 A I did not ask that particular question.

11 Q Now yesterday on direct you testified that you had some
12 discussions with potential lenders before you filed for
13 bankruptcy. Do you remember that testimony?

14 A Yes.

15 Q And you testified that you had conversations with
16 Deutsche Bank, Wells Fargo, Citibank, and JP Morgan, right?

17 A That's correct.

18 Q And as we learned yesterday as part of these discussions,
19 you identified four distinct revenue streams that could be
20 used as security to secure any potential lending facility,
21 right?

22 A Yes.

23 Q I'd now like to move to your discussions with the city
24 council regarding the Barclays DIP. As you testified earlier,
25 the Barclays DIP is subject to market flex, right?

1 A Yes.

2 Q And as part of this market flex provision, the libor
3 floor can flex up from 1% to 2%, right?

4 A That's correct.

5 Q And the spread over libor can flex up from 2.5% to 4.5%,
6 right?

7 A Yes.

8 Q So the minimum interest rate on the DIP loan could go as
9 high as 6.5%, right?

10 A Yes.

11 Q And as part of the fee letter, Barclays has what is
12 defined as a successful syndication target, isn't that right?

13 A That's correct.

14 Q And the terms in the market flex provision allow them to
15 reset the interest rate on the entire loan within the market
16 flex parameters, right?

17 A Yes, under particular conditions.

18 Q So for example if Barclays discovers that the only
19 interested takers of the loan are willing to loan -- or
20 willing to take it at 5%, the portion of the loan that is also
21 retained by Barclays also resets to 5%, right?

22 A If they retained that portion of the loan, yes.

23 Q Okay. And the Barclays DIP also contains a commitment
24 fee, isn't that right?

25 A Yes.

1 Q And the commitment fee is due regardless of whether or
2 not this deal ever closes, right?

3 A Yes.

4 Q And you've already paid half of this commitment fee,
5 correct?

6 A No, we've paid all of it.

7 Q Okay. Okay. And the terms of the market flex provision
8 and the commitment fee are set forth in the fee letter,
9 correct?

10 A Yes.

11 Q And of course the market flex and the commitment fees
12 impact the ultimate cost of the Barclays DIP, right?

13 A Yes.

14 Q And when you were evaluating the various proposals, one
15 of the items that you evaluated was the interest rate, right?

16 A Yes.

17 Q So interest rate is a factor in evaluating the
18 attractiveness of a particular loan, correct?

19 A Yes.

20 Q And you would agree with me that pricing was an important
21 factor when you were evaluating the various proposals, right?

22 A Yes, it was.

23 Q In fact you would not have been in a position to
24 recommend the transaction to Mr. Orr if you were not aware of
25 the specifics of the market flex provision, right?

1 A I think that's correct, yes.

2 Q Now as you've testified, you said that you eventually
3 submitted the Barclays proposal to city council, right?

4 A Yes.

5 Q And under PA 436, if the city council disapproved the
6 Barclays DIP, it then had seven days to submit an alternative
7 proposal that would yield substantially the same financial
8 result or even a better one, right?

9 A I -- I don't think that's how 436 is written. They have
10 seven days to submit an alternative proposal.

11 Q That would yield substantially the same financial result?

12 A That's not how 436 is written. They have seven days to
13 submit an alternative proposal.

14 Q And after you submitted the proposal you had several
15 discussions with the city council members, correct?

16 A I have -- I'm a little lost on the chronology. Could --
17 could you provide some --

18 Q Sure, sure, sure. So after you submitted the proposal to
19 the city council, you had several discussions with city
20 council members, correct?

21 A No.

22 Q You didn't have any discussions with city council members
23 after you submitted the proposal to the city council?

24 A After we submitted the executed commitment letter to

25 council we had a closed door session with the city council in
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1 full.

2 Q And this is a closed door session, correct?

3 A Yes.

4 Q So it was not subject to the Open Meetings Act, correct?

5 A Well, I -- I'm not familiar with every aspect of the Open
6 Meetings Act, but my understanding was that because this was
7 associated with litigation on a number of levels, the city
8 council and their legal advisors determined that a closed
9 meeting was appropriate.

10 Q Okay. And at this closed meeting, the substance of the
11 market flex provision was not provided to the city council,
12 right?

13 A No, it was not.

14 Q I'm sorry. It was not provided, correct?

15 A That's correct.

16 Q Okay. But isn't it true that after you had this closed
17 door meeting that the city council had additional questions
18 about the key terms of the Barclays DIP?

19 A The staff provided us with a list of questions that they
20 asked Jones, Day and Miller, Buckfire to answer.

21 Q Okay. And if we could turn to Syncora Exhibit 233.

22 MR. ARNAULT: I believe this has already been
23 admitted into evidence. Can we bring it up, please?

24 Q Now Syncora Exhibit 233 is an October 20th, 2013 email
25 attaching responses to questions for the city council,

1 correct?

2 A Yes.

3 Q And you are a recipient of this email, right?

4 A Yes.

5 Q And this document contains responses to the city
6 council's inquiries regarding the post-petition financing,
7 correct?

8 A Yes.

9 Q If we could turn to Page 7 of this document, please.

10 Sorry, next page, please. Yeah. And if we look at question
11 13, you'll see that the city council asked whether there are
12 any other key terms that the city council should be aware of.
13 Do you see that?

14 A Yes.

15 Q And in response the city notes that the primary terms of
16 the financing are in the term sheets, correct?

17 A Yes.

18 Q And the city notes the existence of market flex but does
19 not actually disclose the specific terms of the market flex,
20 correct?

21 A Yes.

22 Q Now, Mr. Doak, on redirect -- or on direct, you were
23 asked why you did not disclose the terms of the market flex to
24 the city council. And you stated that you did not want the
25 terms to get out into the market, correct?

1 A That's correct.

2 Q But I think as we established, this was actually a closed
3 door meeting, correct?

4 A That's correct.

5 Q Can we bring up Exhibit 94, please? I believe this has
6 also been admitted into evidence. City Exhibit 94 please.
7 This is the commitment letter with Barclays, correct?

8 A Yes.

9 Q And this document actually sets forth the conditions
10 under which you may disclose the fee letter, right?

11 A Yes.

12 Q And if we could turn to Page 6, please. And if you'll
13 look at Section 8, that actually set forth the conditions
14 under which you may share the commitment letter and the fee
15 letter, correct?

16 A Yes.

17 Q And little (I) there, states that the commitment and fee
18 letters may be disclosed to the City of Detroit's agents,
19 representatives, officers, directors, and advisors on a need
20 to know basis to the extent you notify such persons of this
21 obligation to keep those documents confidential, correct?

22 A Yes.

23 Q And the section also states that the fee letter may be
24 disclosed to the extent required pursuant to applicable law,

25 including any disclosures required to be made to the city.

1 council, correct?

2 A It doesn't say that. What --

3 Q I think we go to the next page, please. Yeah, right at
4 the top there.

5 And we see notwithstanding any of the foregoing with
6 respect to any disclosures regarding the commitment letter or
7 the fee letter to the city council or any local emergency
8 financial assistance loan board as may be required under
9 Michigan PA 436, or Section 36(a) of the Michigan Home Rule
10 Act, correct?

11 A Okay.

12 Q Okay. And you would agree with me that the city council
13 are duly elected representatives of the City of Detroit,
14 correct?

15 A They are -- they are -- yes. They're -- well, I can't
16 tell you exactly how they fit into the architecture of
17 governance under 436 at this point, but they're certainly
18 elected individuals into the city council provisions.

19 Q Sure. Okay. Moving along, have you ever used the -- the
20 forward libor curve to take the swaps all the way out to
21 completion?

22 A I think you're asking have I looked at the libor curve
23 and understand what the implications are and in regards to the
24 size of payments throughout the entire remaining life,
25 technical life of the swap.

1 Q Yes.

2 A So I have an understanding of that.

3 Q Okay. And have you -- have you -- have you done that?

4 A I -- I -- I have not performed the -- the mathematics.

5 We have others on our team that have.

6 Q But you have an understanding of what that shows?

7 A Yes.

8 Q Similarly with respect to the -- the DIP financing, have
9 you done the same thing? Have you used the forward libor
10 curve to take -- to take that all the way out?

11 A Yes.

12 Q Okay. And have you compared the two results, the swaps
13 versus the DIP financing to see what that shows?

14 A No.

15 Q No. So you don't know whether the net present cost of
16 the swaps is actually lower than the net present cost of the
17 DIP financing?

18 A No, I'm -- I think there's a couple problems with your
19 question. Because as it stands the swaps are in default right
20 now. So I would -- I would challenge the assumption that you
21 should be looking at the swaps as if they will exist in their
22 current position in place over the next 20 to -- 20 to 30
23 years. And we -- but we do know that the mark to market
24 liability, the net present value of those -- that swap

25 obligation, you know, comes to the tune of 280,000,000 to
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1 \$290,000,000 in -- in recent times looking at the libor curve.

2 The economic cost of the swap termination portion of the
3 loan is significantly lower because the principal balance of
4 the loan will be 25 to 18% less and in addition the -- the
5 near term cost on a month to month basis is lower.

6 Q Okay. So it sounds like you haven't actually compared --
7 I mean it sounds like you haven't actually compared whether
8 the net present cost of the swaps is lower over time than the
9 net present cost of the DIP financing, is that right?

10 A Based on --

11 Q Assuming that the swaps are not terminated.

12 A Well, the swaps are in default so one would -- one would
13 have to -- one would have to question how -- whether that
14 would be an appropriate analysis to perform.

15 Q But it's not an analysis that you performed, correct?

16 A We -- it's -- that is not a particular analysis that --
17 that I had performed. We do know what the overall economic
18 cost is of the swaps to the end of the life. Effectively
19 that's the mark to market liability.

20 MR. ARNAULT: Okay. No further questions, Your
21 Honor.

22 CROSS EXAMINATION

23 BY MR. MARRIOTT:

24 Q Good morning, Mr. Doak.

25 A Good morning.

1 Q Vince Marriott of Ballard, Spahr representing EEPK and
2 affiliates. I have just a few questions for you. You
3 indicated in your response to previous questions that you did
4 not personally call any potential post-petition lender to ask
5 if they would provide to the city unsecured credit, correct?

6 A Yes.

7 Q Yes, that's correct?

8 A Yes, that -- that's correct. That would not --

9 Q I just want to make sure the answer doesn't come in
10 ambiguously.

11 A Okay.

12 Q My understanding is that you led the efforts of the city
13 to find post-petition financing, correct?

14 A Yes, I executed most of the activities and -- and led the
15 process.

16 Q Okay. Did you direct anybody else to contact a
17 prospective lender or lenders to ask if they would provide to
18 the city unsecured credit?

19 A No, I did not.

20 Q Did anybody do that anyway and report to you the answer?

21 A Not to my knowledge, no.

22 Q If we could bring up briefly City 90.

23 THE COURT: I'm sorry, sir, what number?

24 MR. MARRIOTT: I'm sorry, City 90.

25 Q And if we could turn to the -- well, the sixth page

1 including the cover page. Thank you. Now if I understood
2 your previous testimony, Mr. Doak, Exhibit 90 was a
3 presentation that you provided to the members of city council,
4 correct?

5 A Yes.

6 Q And these were the briefing materials from which you
7 spoke when you met with each of the city council members
8 individually?

9 A Yes.

10 Q And your testimony was that in the context of those
11 discussions, you did not indicate to members of city council
12 at least what the substance of any market flex provision would
13 be, but you did provide them with a range of interest rates
14 that could apply to the post-petition financing, is that
15 correct?

16 A That's correct.

17 Q And -- and that's what this page reflects, that range of
18 interest rates that you provided to them?

19 A Yes. This reflects a range of all end costs for the
20 facility.

21 Q Okay. And -- and it could run according to this chart
22 from a low of 5% up to 9%, correct?

23 A Yes.

24 Q So the range that you provided to them was one at the low

25 -- the high end was almost twice what the low end was,
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1 correct?

2 A Yes.

3 Q Now if we could turn to City Exhibit 89. And -- and
4 first let me just -- well, I understood your earlier
5 testimony, this presentation was provided to among others,
6 emergency manager Orr, correct?

7 A Yes.

8 Q And is it fair to say that this presentation was provided
9 to emergency manager Orr to assist him in evaluating the
10 relative merits of the four commitment letters that the city
11 received?

12 A Yes.

13 Q Okay. And if you would flip to the last page of this
14 exhibit. This is the all end cost analysis whereby the -- the
15 various potential costs of the facilities contemplated by
16 those four commitment letters, was provided to Mr. Orr,
17 correct?

18 A Yes.

19 Q With the contemplation that he would use this information
20 to assist him in deciding which if any of these commitment
21 letters to -- or the -- which of any of these commitments to
22 proceed with, correct?

23 A Yes. We -- we were not asking him to make a definitive
24 decision at that particular meeting. But this was to advise

25 him as to the comparative economics of the proposals at that
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1 time.

2 Q Okay. Now in providing information to Mr. Orr, you
3 didn't provide a range of potential interest rates from 5 to
4 9%. You provided the actual potential interest rates, market
5 flex, and all under each of the commitments that the city had
6 in hand at that time, correct?

7 A Yes.

8 Q Would you have considered yourself adequately advising
9 him on the potential costs of these facilities if instead of
10 giving him the actual interest rates you just gave him a
11 range?

12 A No.

13 Q And I believe you also testified on direct that you gave
14 -- you gave two, unless I missed one, two principal reasons
15 for ultimately recommending the Barclays loan to Mr. Orr. The
16 first you gave was the best economics, correct?

17 A Yes.

18 Q Okay. And this last page of City 89, is a summary
19 depiction of the economics, correct?

20 A Yes, it is.

21 Q The second reason you gave if I heard you correctly was
22 that Barclays number one was undertaking to fully underwrite
23 the facility and they were an institution that could -- you
24 felt could close, correct?

25 A Yes.

1 Q Okay. And -- and there was a third and I have trouble
2 reading my own notes, you found the collateral provisions of
3 the Barclays facility to be the most favorable of the
4 commitments you received?

5 A We -- we did, yeah. We -- the Barclays facility was the
6 best overall financing that the city had available given all
7 the elements of the commitment. The economics, the collateral
8 terms, the other lender protections, where they were willing,
9 where we resolved issues and associated with legal opinions,
10 it -- it was the best overall proposal that the city had
11 available.

12 MR. MARRIOTT: Nothing further.

13 CROSS EXAMINATION

14 BY MS. GREEN:

15 Q Good morning, Mr. Doak. I'm Jennifer Green on behalf of
16 the Retirement Systems for the City of Detroit.

17 A Good morning.

18 Q As you understand it the funds related to the quality of
19 life note will be deposited in one lump sum, correct?

20 A Yes.

21 Q And those funds will be deposited into the city's general
22 fund account, not into a special re-investment account,
23 correct?

24 A My current understanding is that it will be deposited

25 into a -- an account that would be appropriately accounted for
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1 as a general fund account, however, it most likely will be
2 deposited into a specific segregated bank account.

3 Q And the funds from the quality of life note are not
4 earmarked for a particular purpose though, correct?

5 A They are not earmarked for a particular purpose.

6 Q And you can't answer why the city will not commit to
7 using those proceeds for a particular purpose, correct?

8 A I -- I don't -- sorry, can you ask that question again?

9 Q You cannot answer why the city will not commit to using
10 the proceeds for a particular purpose, correct?

11 A I -- I can provide you an answer.

12 Q What's that?

13 A I think the -- the -- the number of different projects
14 and revitalization needs that the city has right now are --
15 are extensive and I believe that there is some flexibility
16 that's desired by the -- by the leadership team to deploy the
17 capital in the most efficacious purposes. And those
18 determinations will most likely be made on a real time basis.

19 Q Mr. Doak, do you remember being -- being deposed on
20 December 5th of 2013?

21 A Yes.

22 MR. HAMILTON: Your Honor, I'm going to object to
23 the relevance of this whole line of inquiry. I believe you
24 ruled on Friday this isn't relevant.

1 what I was looking for, that's why I'm bringing up his
2 deposition. He answered differently at his deposition.
3 That's -- that's why. I'm not going into the --

4 THE COURT: So you want to impeach him on an
5 irrelevant point?

6 MS. GREEN: No. I -- I -- I didn't think he was
7 going to answer with the purpose. He said something different
8 about where the funds were going to be deposited in general.
9 I didn't expect him to say anything about the re-investment
10 structure.

11 THE COURT: Why do we care where the funds will be
12 deposited?

13 MS. GREEN: Pardon me?

14 THE COURT: I'm sorry. Where do we care about where
15 the funds will deposited?

16 MS. GREEN: He testified previously that they would
17 be deposited into the general fund and that they would not be
18 earmarked for any particular re-investment purpose.

19 THE COURT: Right. Why do we care about that?

20 MS. GREEN: It's not related to what I take his
21 objection to be. Under the city's proposed order, they are
22 asking for certain findings of fact and conclusions of law
23 relating to the validity of the collateral with respect to the
24 quality of life note.

1 several parties have objected to the legality of that
2 collateral. In order to find -- for this Court to find that
3 that collateral is a valid pledge, I believe that the use of
4 the proceeds for proceeds approved under the gaming act is
5 still a relevant issue, setting aside what the objection is.
6 And I think I understand his is to be more limited than the
7 purpose I'm seeking it for.

8 MR. HAMILTON: I withdraw the objection, Your Honor,
9 if that's the purpose.

10 THE COURT: Well, but I -- I would suggest to you
11 that you get to that rather than worry about what specific
12 bank account it happens to land in.

13 MS. GREEN: But I didn't expect the answer. I
14 expected something different, Your Honor.

15 THE COURT: All right.

16 Q Mr. Doak, do you remember being deposed on December 5th?

17 A Yes.

18 Q Can you pull up Exhibit 236, please? Page 187. It
19 actually starts on Page 186 at the bottom. At Line 22, Mr.
20 Doak, if the post-petition financing is approved, is my
21 understanding correct that the city will receive the proceeds
22 as a part of one lump sum? Yes, that's correct. Do you
23 recall that testimony?

24 A Yes.

1 is your understanding of what will happen to the remainder of
2 those funds? The aspect that is the quality of life note,
3 what will happen to that lump sum? That will be deposited in
4 the city's general fund. Do you recall that testimony?

5 A Yes.

6 Q And on Page 188. So as part of the general fund, is it
7 fair to say that those quality of life proceeds are not
8 earmarked for any particular purpose? Object to form. You
9 stated they will -- the proceeds will not be placed to the
10 best of my knowledge in a segregated account and that the
11 spending will occur as I understand it, is not going to be
12 from a segregated account. Do you recall that testimony?

13 A Yes.

14 Q Okay. And the concept of calling it a quality of life
15 note, was the idea --

16 A Would you like to know why the answer is changed?

17 Q Sure, why is your answer different today than it was a
18 week ago?

19 A We've -- we've had subsequent negotiations with one of
20 the objectors, NPFG and we've also had discussions with the
21 city in regards to how the city is going to be administrating
22 the quality of use funds. There is now in the latest version
23 of the order, some understanding as to how the city will be
24 attempting to track how the proceeds are used and report back
25 to key stakeholders on a monthly basis.

1 I'm also aware of dialogues between Conway, MacKenzie and
2 other city officials in regards to how they want to think
3 about using the funds and they have indicated it's
4 administratively easier for them to potentially track it in a
5 separate account.

6 Q For clarification purposes, let's pull up the latest
7 order so you can clarify which portion of the order you are
8 referring to.

9 A I -- I'm not -- sure.

10 Q Okay. Can I direct your attention to the first page. Do
11 you recognize this order as being the one that has recently
12 been amended? The date is at the bottom.

13 A So this -- this looks like it's the 16th at 6:10. And I
14 don't know whether the negotiation with NPMFG was completed by
15 that. In fact I'm -- I'm pretty sure it may not have entered
16 into this particular version of the order.

17 Q So subsequent to this order, you have re-negotiated a
18 term relating to the use of the proceeds?

19 A No. Just how we are going to provide some information
20 and reporting on what we're -- on -- on how we're going to be
21 tracking the -- tracking the spending.

22 Q Can I direct your attention to Page 7? (ii), use of the
23 proceeds of the post-petition facility. Is that paragraph
24 consistent with the negotiation and the amendment that you

25 just referenced?

1 A Yes.

2 Q Okay. So this is the negotiation that you just
3 referenced with NPFG?

4 A No.

5 Q No. So I'm just trying to clarify. This order does or
6 does not contain the subsequent negotiations and the resulting
7 amendment that you are referencing?

8 A Given the -- given the time stamp on it, I -- I don't
9 know if it does. I don't believe it does. And once again
10 that is -- this is related to a -- a reporting or information
11 -- subsequent information providing requirement to the -- to
12 stakeholders.

13 I -- I don't know if the order itself is going to include
14 a particular provision in regards to what bank accounts are
15 used. That's my -- my information there is based on dialogue
16 that I've had with city officials and advisors.

17 MS. GREEN: I'll move on, Your Honor, except that
18 we've all been tailoring our cross examinations based on the
19 details in the proposed order. This one was filed just two
20 days ago, so we've all been using that as our template.

21 And if there is a purpose of the quality of life note
22 that's been injected back into the case, we may have further
23 questions. I'm just not sure at this time.

24 THE COURT: Well, let's just inquire. Is there a

25 later version of the proposed order than this one?

1 MR. HAMILTON: I believe -- I think this is the
2 current one, Your Honor. I think it's Paragraph 18 is what
3 she meant to be looking at.

4 THE COURT: Eighteen?

5 MR. HAMILTON: Eighteen.

6 MS. GREEN: So there, just to clarify, there is not
7 another order that will be filed after this.

8 MR. HAMILTON: There was a -- a typo that we found
9 that we need to correct, but substantively this is the current
10 state of the -- of the order.

11 MS. GREEN: Thank you.

12 Q And back to the quality of life note. The concept for
13 calling it a quality of life note was an idea by a -- an
14 attorney for the City of Detroit, correct?

15 A That the name first appeared in a document -- in a
16 document that was drafted by Jones, Day.

17 Q Okay. And this phrase, quality of life, originated in
18 mid to late August of this year, correct?

19 A Yes.

20 Q And it was after the objections to the forbearance
21 agreement and the assumption motion were filed in mid-August?

22 A I -- I don't know the timing of the objections, but that
23 would --

24 Q After August 16th?

25 A Yes.

1 Q Okay. And this terminology was used in response to
2 concerns related to the Michigan Gaming Revenue Control Act,
3 correct?

4 A This terminology was used because it appropriately
5 reflected the -- how the funds would be deployed.

6 Q Well, you had discussions about the Gaming Control Act
7 while you were developing the term sheet, correct?

8 A Yes.

9 Q And you incorporated ideas from those discussions when
10 you were formulating the purpose for which the quality of life
11 proceeds could be used, correct?

12 A Could you state that again?

13 Q You incorporated certain ideas from these discussions
14 when you were formulating the purpose for which the quality of
15 life proceeds would be used, correct?

16 A I -- I -- I believe that's accurate, but I -- I'm not
17 quite sure about the concept of formulating the purpose. But,
18 okay. I -- I didn't formulate a -- a purpose. I formulated a
19 construction of the -- the term sheet.

20 Q And you decided to call the loan that was not going to be
21 used to pay off the swaps, the quality of life loan in August
22 as we established. But your first awareness of the Michigan
23 Gaming Act was actually back in June, correct, during
24 negotiations by the swap counter parties?

25 A Yes.

1 Q So you're generally familiar, or were familiar with the
2 notion that there are limitations on the use of casino revenue
3 under Michigan law?

4 A Yes.

5 Q And as you were drafting the term sheet you purposely
6 structured it so that different collateral would secure the
7 quality of life note versus the way that the swap note would
8 be collateralized, correct?

9 A Yes.

10 Q And you only offered the casino revenue for the quality
11 of life note collateral because you thought that it would be
12 less controversial given that the marketplace was aware of the
13 arguments that had been made in connection with the assumption
14 motion that had been filed, correct?

15 A Yes.

16 Q And in fact even with this collateral structure that you
17 came up with, some potential lenders still had concerns
18 regarding the casino revenue being used as collateral,
19 correct?

20 A Yes.

21 Q And I think that you just testified they were concerned
22 about the collateral with respect to both federal and state
23 law, correct?

24 A Lenders were concerned about how their collateral

25 interest would be structured and formalized, both in the

1 context of state law and in the context of federal law.

2 Q Okay. And city council also had concerns with using the
3 casino revenue as collateral due to the gaming act, correct?

4 A I don't know whether I could affirm that statement. City
5 council, various city council members voiced their concern in
6 regards to the use of gaming tax revenues in the first place
7 in regards to some of the transactions in -- in 2009.

8 Q Do you remember meeting with someone named Irv Corley,
9 the executive policy manager of the city council's policy
10 division?

11 A Yes.

12 Q Do you remember this concern about the collateral and the
13 casino revenue being raised by Mr. Corley during that meeting?

14 A It most likely was.

15 Q Okay. Can you pull up Exhibit 233? And you recognize
16 these. You asked about these earlier. These are the
17 questions that were sent to you from city council? Well, this
18 is the cover email, but attached to this are the questions?

19 A Yes. This is the Q and A that was provided back to the
20 city council.

21 Q Okay. And this -- this casino revenue collateral issue
22 was also raised by the city council in their written questions
23 to you?

24 A It -- it most likely -- likely was.

25 Q Okay.

1 A This was a set of questions prepared by city council
2 staff.

3 Q Okay.

4 A So I -- I can't tell you whether it was actually the city
5 council that raised this.

6 Q Fair enough. Can I direct your attention to Page 6,
7 Question 9? Question 9 states, under MCL 432.212, do you
8 understand that that's the Michigan Gaming Act, a reference to
9 that?

10 A Okay.

11 Q It lists the restrictions on the use of wagering taxes.
12 Which category allows the use of wagering taxes to secure the
13 swaps or the proposed financing? The response was, with
14 respect to the swaps, the swap counter parties have made
15 certain legal arguments in support of the pledge of wagering
16 taxes which speak for themselves.

17 In connection with the proposed post-petition financing,
18 the city intends to rely on the Federal Bankruptcy Code to
19 authorize the pledge of collateral including the wagering
20 taxes. Did you -- did you work on this response to this
21 particular question?

22 A I did not work on this response.

23 Q But you understand that the city council's question was
24 what purpose under Michigan law and under which category of

25 the gaming act the casino revenue would be used for, correct?

1 MR. HAMILTON: Your Honor, at this point I think
2 we're beyond the competence of the -- of the witness to
3 answer. He didn't work on this portion of this unit.

4 THE COURT: The objection is sustained.

5 Q Do you know who did prepare the responses to the
6 questions raised by city council?

7 A Yes.

8 Q And who prepared these responses?

9 A Two attorneys from Jones, Day.

10 Q Okay. You would agree with me that based on the plain
11 language of the answer since I will not be cross examining an
12 attorney from Jones, Day, that there is no use listed in the
13 response under Michigan law specifically referencing the
14 gaming act?

15 MR. HAMILTON: Object, Your Honor. It's calling
16 for --

17 THE COURT: The objection is sustained. You -- you
18 can argue that, but --

19 MS. GREEN: I'll move on.

20 Q The city council, I believe we already established they
21 were not given a copy of the fee letter?

22 A That's correct.

23 Q And you admit that fees are important to you in analyzing
24 the transaction, correct?

25 A Yes.

1 Q I believe you were already asked this question about the
2 market flex provision, but I don't know that anyone asked this
3 with respect to the fees. If you didn't know the amount of
4 the fees associated with the loan, do you agree with me that
5 you would not be in a position to recommend the \$350,000,000
6 financing to the city?

7 A I -- I would agree with you.

8 Q Okay. Can we pull up Exhibit 1003? Mr. Doak, do you
9 recognize this email dated August 29th, 2013? Or it might be
10 August 30th, there's two.

11 (Retirement Systems Exhibit 1003 was identified)

12 A I -- I --

13 Q Can you pull up the -- the paragraph below it? The body
14 of the email.

15 A It -- it looks that -- that looks like the letters that
16 -- email and correspondence we were sending to many of the
17 potential lenders.

18 Q Okay. And the to and from portion of the email states
19 that it's an email from you to Bruce Mendelson at Goldman
20 Sachs?

21 A Yes.

22 Q And Goldman Sachs was a potential lender with respect to
23 the post-petition financing, correct?

24 A Yes.

25 Q And Mr. Mendelson was inquiring, if we go to the next
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1 paragraph of the email. It says Jim, thank you for sending
2 the information over. We've begun our work and are far along
3 in clearing our internal conflict system. Is there a data
4 room that you were planning on making available or should we
5 provide a list of diligent questions. Do you remember this
6 email?

7 A Not -- not this particular email, but I -- that looks
8 completely consistent with what he might have written to me.

9 Q And with the work that you were doing to prepare the
10 information that the lenders would need, correct?

11 A Yes.

12 Q And your response to him, if we could go to the email
13 directly above that. Hold off on the due diligence, we have a
14 data room and there's a liquidity piece under development.
15 You did not call the liquidity piece a quality of life
16 improvement piece to Mr. Mendelson, did you?

17 A No. That reference, a liquidity piece under development
18 is a reference to the -- the monthly cash flow liquidity
19 forecast that we subsequently provided to all of the potential
20 lenders that signed the NDA.

21 Q Okay. Can we also look at email Exhibit 1005? At the
22 bottom portion dated August 29th, it's an email from you. Do
23 you recognize that email?

24 (Retirement Systems Exhibit 1005 was identified)

25 A Yes.

1 Q And is this another solicitation email to a prospective
2 lender?

3 A Yes. In a -- yes, it is.

4 Q And Mr. Gavin is an investment banker at RW Baird,
5 correct?

6 A Yes, he is.

7 Q And you were reaching out to him as a potential source
8 for the post-petition financing?

9 A Yes. We -- we -- we were reaching out to RW Baird to see
10 whether they wanted to look at the financing opportunity.

11 Q And the email states exactly that, we're working on
12 sourcing 350,000,000 post-petition financing for the city, use
13 of proceeds is to financing the swap termination and provide
14 general fund liquidity through the Chapter 9 case. Do you see
15 that portion?

16 A Yes.

17 Q And that's not relating to the liquidity forecast,
18 correct? That's the actual purpose of -- of the use of the
19 proceeds?

20 A Yes. This was sent to him to get a quick understanding
21 as to whether RW Baird wanted to be incorporated into the
22 process and receive the formal invitation.

23 Q And you also had a conversation with Mr. Gavin relating
24 to the potential post-petition financing shortly after this

25 email, correct?

1 A Yes.

2 Q And in this conversation he told you -- let's go to the
3 next portion of the email, please. The top of the email it
4 says when we spoke I said the counter parties didn't get a
5 bankruptcy opinion. Is he referring to the phone conversation
6 that you had?

7 A Yes, he is.

8 Q Okay. Further down in the second paragraph as I said on
9 the phone, the counter parties' attorneys did not believe that
10 the pledge survived, but they did what they could get from
11 Oreck. And attached to this email was a legal opinion from
12 Oreck, correct?

13 MR. HAMILTON: Your Honor, at this point I think
14 we're talking about double hearsay about what somebody who's
15 not in Court said, somebody else who is not in Court said. I
16 would object on that ground on this portion of the email.

17 THE COURT: Well, excuse me again. Is this exhibit
18 in evidence?

19 MS. GREEN: Not yet. I was going to move for its
20 admission after we established certain things relating --

21 THE COURT: Okay. Again, it's not proper to ask a
22 witness about the content of a document until it is in
23 evidence. So on that ground the objection is sustained.

24 MS. GREEN: Your Honor, I would move for the

25 admission of Exhibit 1005.

1 MR. HAMILTON: And, Your Honor, we would object to
2 the portion of the exhibit that contains the double hearsay,
3 the portion that's actually currently highlighted on the
4 screen. We don't object to the statements that this man made
5 to Mr. Doak in response to Mr. Doak's inquiries. But when
6 this man is -- if they're introducing what this man is saying
7 about what somebody else said that is -- has no relation to
8 the financing that's being sought, that's double hearsay and
9 should not come in.

10 MS. GREEN: May I respond? I will be using this
11 particular sentence for its affect on Mr. Doak and what he did
12 afterward, not to establish the truth of the email itself.
13 And so therefore I do not believe I'm using it for the truth
14 of the matter asserted and it's not hearsay.

15 THE COURT: For that very limited purpose, the Court
16 will overrule the objection and admit into evidence Exhibit
17 1005.

18 (Retirement Systems Exhibit 1005 was admitted)

19 MS. GREEN: And, Your Honor, I believe that my
20 Exhibit 1003 is already in evidence, the one that I asked him
21 about previously.

22 THE COURT: Would you like me to check for you?

23 MR. HAMILTON: No objection, Your Honor. We don't
24 object to it being admitted into evidence. It's not into
25 evidence yet, but we don't object.

1 THE COURT: 1003 is --

2 MS. GREEN: Right, Your Honor.

3 THE COURT: 1003, all right. 1003 is admitted.

4 (Retirement Systems Exhibit 1003 was admitted)

5 Q If we could pull the portion up that we had up a moment
6 ago. And attached to this email was a legal opinion from
7 Oreck, correct?

8 A Most likely.

9 Q And I think we established when we -- when you testified
10 at your deposition you didn't read the legal opinion, but you
11 knew that it was attached?

12 A Yes.

13 Q Okay. And that Oreck opinion, do you understand that
14 that's the same opinion that was attached to the collateral
15 agreement?

16 A I don't -- all I know is the Oreck opinion related to the
17 2009 swap amendment.

18 Q Fair enough. The portion that we read earlier, as I said
19 on the phone the counter parties' attorneys did not believe
20 that the pledge survived, but they did what they -- did get
21 what they could from Oreck. And to your knowledge this
22 information was gained through Mr. Gavin's role as a financial
23 advisor to the city in 2009, correct?

24 MR. HAMILTON: Again, I'm going to object now on

25 relevance grounds. This has nothing to do with the financing,
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1 the post-petition financing facility. It's not within the
2 scope of his direct. I -- I don't see how this relates to the
3 post-petition financing facility.

4 MS. GREEN: Your Honor, I believe that it does
5 relate to the ability of the city to have potentially gotten a
6 better deal. Yesterday we heard evidence relating to the
7 city's poor bargaining position in relation to the forbearance
8 agreement. We heard that they had no leverage. The cards
9 were stacked against them.

10 I think that certain evidence tends to show that after
11 they entered into the agreement they learned information that
12 could have strengthened our case and I want to explore whether
13 this information was used to reconsider their position, to
14 investigate further, things of that nature.

15 THE COURT: This is arguable. I'll permit it. Go
16 ahead.

17 A Could you ask the question again, please?

18 Q Sure. Your understanding was that this knowledge was
19 gained by Mr. Gavin through his role as a financial advisor to
20 the city in 2009, correct?

21 A I have -- I have no knowledge and do not recall having
22 knowledge at the time as to whether Tom Gavin was or RW Baird
23 was an advisor to the city for the purposes of that
24 transaction.

1 financial advisor or consultant for the City of Detroit,
2 correct?

3 A His -- yes. His engagement as I understand it has been a
4 standing one related to the water fund and the sewer fund and
5 the debt of DWSD. I don't know what RW Baird's role was or if
6 they had a role with regards to the 2009 deal.

7 Q Okay. Rather than taking this down and pulling your
8 deposition up, I will read it so that we don't have to switch.
9 You recall being deposed on December 5th, correct?

10 A Yes.

11 Q Do you recall being asked a question about Mr. Baird and
12 your conversations and your knowledge of his involvement with
13 the City of Detroit?

14 MR. HAMILTON: Your Honor, could we at least have a
15 page reference so I can --

16 MS. GREEN: 215.

17 Q Do you recall testifying about that?

18 A I don't recall that particular -- I don't recall that
19 particular question, but I'm sure you asked it.

20 Q Do you recall testifying, "he had a recollection, meaning
21 Mr. Gavin, or at least a narrative in regards to the
22 negotiations that occurred amongst the parties in 2009 and he
23 was informing me of a dialogue that he indicated had occurred
24 in the negotiations between the city and its advisors, and the
25 swap counter parties and their advisors, in regard to

1 structuring the collateral agreement and the amendment to the
2 swaps"?

3 A Yes.

4 Q Does that change your answer as to whether or not you're
5 -- the context of your conversation was that he was a former
6 financial advisor during the 2009 negotiations?

7 A Absolutely not. I didn't know if that was firsthand,
8 secondhand, thirdhand, fourth hand, at the bar (Inaudible). I
9 -- I didn't know where he came up with this.

10 Q Okay. After you spoke to Mr. Gavin and you received this
11 email from him, you then forwarded this information to the
12 city's legal advisors, correct?

13 A Yes.

14 Q And why do you share it with -- why did you share it with
15 them?

16 A I shared it with them --

17 MR. HAMILTON: At this point I think we're getting
18 into privilege, Your Honor.

19 MS. GREEN: Perhaps, then I -- with that caveat, if
20 there's a non-privileged answer, I'll take it.

21 THE COURT: I don't know that we can rely on the
22 witness to know the difference.

23 Q Without disclosing any potentially attorney/client
24 privileged information, did you have a reason for forwarding

25 this email? If you can't answer it without disclosing that's
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1 fine, sorry. Just --

2 A It seemed to be a pertinent conversation to make sure
3 that I was not the only person who was aware of this act that
4 my conversation had occurred.

5 Q Okay. And did you share it with the swap counter parties
6 as well?

7 A No.

8 Q Do you know if anyone from the city's team shared it with
9 the swap counter parties?

10 A No.

11 Q Did you do any further investigation as to whether Mr.
12 Gavin's statements were true?

13 A No.

14 Q Did you ask Mr. Gavin for the names of the individuals
15 that allegedly said these statements?

16 A No.

17 Q Did you look for any documents where the swap counter
18 parties may have made this admission -- admission in writing?

19 A No.

20 Q Did this information cause you in any way to reconsider
21 the deal that had previously been struck?

22 A In -- my focus at that particular point was on moving
23 forward with the post-petition financing and my area of focus
24 was not on the executed forbearance agreement and where it

25 would go from there.

1 Q Good point. Do you know if anyone else on the emergency
2 manager's team or perhaps your colleague Mr. Buckfire used
3 this information as leverage with the swap counter parties?

4 A I -- I don't know.

5 Q Do you know after you forwarded this information on to
6 others, do you know if anything was ever done with this
7 information in regards to due diligence that could be
8 performed to look into the story that you were told?

9 A I don't know.

10 Q Is it fair to say that this information didn't cause you
11 to re-think the strategy of seeking post-petition financing
12 versus litigating the underlying swap transactions?

13 A I -- I -- could you ask the question again? Because
14 I'm --

15 Q You just testified --

16 A Is it the whole city or -- or like we -- we had an
17 executed forbearance agreement that provided advantages to the
18 city and, you know, -- and -- and had, you know, various
19 obligations. And I was working on the -- the financing.

20 If there was to be a reverse of course on the direction
21 we were going on the forbearance optional termination
22 agreement, it would not have come from me.

23 Q Okay. There were continued negotiations though related
24 to the forbearance agreement after its initial execution date,

25 correct? Five amendments?

1 A Yes. There has been subsequent amendments.

2 Q And there's a sixth one in the works, right?

3 A Yes.

4 Q And some of those are related to the fact that the city
5 missed the first discount milestone date?

6 A Sure, yes.

7 Q And the current size of the discount is a 25% discount
8 until January 1st, I believe?

9 A Well, the -- without an execution of the Sixth Amendment,
10 we -- we are in the 82 price zone.

11 Q Okay. And did you use any of this information as
12 leverage to negotiate yourself back into the 75% price zone?

13 A This is -- once again I'm focused on the post-petition
14 financing. And I have not taken a laboring or on the dialogue
15 with the swap counter parties.

16 MS. GREEN: Understood. Thank you. I have no
17 further questions, Your Honor.

18 THE COURT: All right. Stand by one second, please.
19 All right. We'll take our morning recess now and reconvene at
20 10 after 11:00, please.

21 (WITNESS JAMES DOAK WAS TEMPORARILY EXCUSED AT 10:46
22 A.M.)

23 THE CLERK: All rise. Court is in recess.

24 (Court in Recess at 10:46 a.m.; Resume at 11:13 a.m.)

25 THE CLERK: All rise. Court is in session. Please

1 be seated.

2 (WITNESS JAMES DOAK RESUMED THE STAND AT 11:13 A.M.)

3 THE COURT: It appears everyone is present, let's
4 proceed. Everyone except Ms. Green.

5 MR. HACKNEY: I think Mr. Doak probably would like
6 to confirm that we're done with him, sir.

7 THE COURT: Okay.

8 MR. HAMILTON: No redirect, Your Honor.

9 THE COURT: All right. You're all set, sir.

10 A Okay.

11 (WITNESS JAMES DOAK WAS EXCUSED AT 11:14 A.M.)

12 MR. SHUMAKER: Good morning, Your Honor. Greg
13 Shumaker, Jones, Day for the City of Detroit. The city calls
14 Kevyn Orr to the stand.

15 THE COURT: While we have a moment, my latest count
16 is 243 minutes left for the city and 319 minutes left for the
17 objecting parties.

18 MS. GREEN: Thank you, Your Honor.

19 THE COURT: Please raise your right hand.

20 (WITNESS KEVYN ORR WAS SWORN)

21 THE COURT: Please sit down.

22 DIRECT EXAMINATION

23 BY MR. SHUMAKER:

24 Q Good morning.

25 A Good morning.

1 Q Would you please state your name for the record?

2 A Kevyn D. Orr.

3 Q What's your current position, Mr. Orr?

4 A Emergency manager, City of Detroit.

5 Q Mr. Orr, are you aware of a document or agreement known
6 as the forbearance and optional termination agreement?

7 A Yes.

8 Q I'm going to refer to it as the forbearance agreement
9 this morning, is that okay with you?

10 A Yes.

11 Q Okay. What was your role in the negotiation of the
12 forbearance agreement?

13 A I participated in the negotiations towards the end to
14 final we get to definitive terms.

15 Q Who led the business and legal negotiations for the city?

16 A On the business side, it would be Ken Buckfire, the
17 city's investment banker. And on the legal side attorneys at
18 Jones, Day.

19 Q Anyone in particular at Jones, Day?

20 A I believe Corinne Ball and Bruce Bennett.

21 Q Okay. Why did you have Mr. Buckfire take the lead on the
22 business negotiations?

23 A Mr. Buckfire is the city's investment banker of the
24 restructuring effort and had participated in these types of

25 negotiations and financial arrangements before.

1 Q And when did the -- the swap -- I'm sorry, when did the
2 negotiations relating to the forbearance agreement begin?

3 A I believe they began in late May throughout June. I
4 became involved in early June.

5 Q Okay. And why did you believe pursuing such an agreement
6 in the May, June time period was important?

7 A The city was flowing cash flow negative quite severely,
8 almost to the point that we would not have sufficient cash to
9 make -- meet obligations as they became due.

10 Q Were there any other concerns that you had with regard to
11 the city's position at that time?

12 A Sure. In addition to cash flow concerns, I was concerned
13 that we wouldn't be able to provide services to the city. And
14 that we also were at risk of being in default and might lose
15 access to the casino revenue.

16 Q Was there any concern about a termination payment under
17 the swaps?

18 A Yes. We have been in default and there was quite a large
19 termination payment that could be due as well.

20 Q Did you have a sense as to how much that termination
21 payment might be?

22 A At that time I had heard figures somewhere between
23 300,000,000 to 400,000,000.

24 Q What was your understanding of why the city was facing a
25 termination payment at that time?

1 A The -- the city had been in default for a number of
2 issues including the declaration of the emergency and the
3 appointment of an emergency manager. Obviously in the event
4 of default. And the swap counter parties had been forbearing
5 for some period of time, so the city was at risk at any given
6 time of being declared in default and those parties exercising
7 their remedies.

8 Q As you started out with these negotiations, what were
9 your objectives?

10 A Our objectives really were to get the best discount we
11 could over the termination fee that was due to relieve any
12 threat, to losing the casino revenue and to also to the extent
13 we could, reduce the risk of litigation so we could stabilize
14 the city's finances and go cash flow positive.

15 Q You talk about the cash. Any particular portion of the
16 city's cash that you were referring to, the casino revenues
17 has come up?

18 A Yes. Casino developer revenue, yes.

19 Q Okay. Why is access to the casino revenue so important
20 to the city?

21 A Casino revenue is the single most stable source of
22 revenue available to the city. And without it the city cannot
23 operate.

24 Q Could you summarize for the Court how the negotiations
25 progressed from your standpoint?

1 A Yes. They progressed at a pace in June and in
2 approximately the June 10th to June 14th time frame. They
3 became more critical. There were a number of different
4 sessions that I personally was involved with where
5 negotiations broke down and the parties would try again
6 ultimately reaching an agreement on June 12th or 13th, I
7 believe.

8 Q So you've mentioned that you got involved towards the
9 end. What -- what do you mean by that? You -- what did you
10 personally do?

11 A Well, the -- the negotiations were going forward
12 principally on the business side from Mr. Buckfire and on the
13 legal side with the attorneys at Jones, Day for some weeks
14 before I got involved. But personally I began to negotiate
15 what I hoped to be the best possible discount percentage that
16 we could get.

17 Q I want to talk a little bit -- ask you a few questions
18 about the -- the discount that you referred to. But focusing
19 right now on negotiations, and you said that Mr. Buckfire at
20 Miller, Buckfire, and Ms. Ball, and Mr. Bennett at Jones, Day,
21 how often did you communicate with them about negotiations
22 during this time frame?

23 A I -- I communicated either directly or indirectly
24 regularly throughout the June time frame with Mr. Buckfire for
25 a number of days. We actually sat in the same room and had

1 phone calls off and on several times a day.

2 Q Do you recall what the opening positions of the city and
3 the swap counter parties were?

4 A Yeah. Generally speaking the -- the city wanted to get
5 the maximum discount available, relieve itself of the threat
6 to the casino revenue, release any liens that might -- that
7 the parties have on that revenue. The swap counter parties
8 wanted to take the position that they were 100% secured and
9 wanted to recover their total amount due.

10 Q Do you recall what the city's opening position was?

11 A I recall that by the time I got involved the negotiations
12 were in the 80% range. And we -- we wanted to push to see if
13 we could get better.

14 Q Before you got to that position, how would you describe
15 the negotiations between the city and the swap counter
16 parties?

17 A My understanding that negotiations were arm's length.
18 They were robust. And they were quite contentious from time
19 to time.

20 Q Were you coming to an agreement easily?

21 A No, not at all.

22 Q Why did you think that was the case?

23 A Well, I -- I think the parties held very strong positions
24 on both sides.

25 Q You -- you mentioned the -- the events of default and
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1 that you were an event of default yourself. How did those
2 events of -- of default affect the negotiations?

3 A Well, I -- I think the swap counter parties wanted to
4 press and -- and suggested that they knew we were in default,
5 so they wanted us to acknowledge that they were forbearing and
6 there was a value to that. We wanted to press that the city's
7 condition was quite dire. And while there were defaults, we
8 had been paying the obligations as they had become due, but
9 the risk to the city remained.

10 Q What did the -- an event of default allow the swap
11 counter parties to do?

12 A Well, it could have allowed them to trap the casino
13 revenue.

14 Q And you mentioned the termination payment as well?

15 A Yes.

16 Q Had the -- the swap counter parties attempted to trap the
17 casino revenues before this time?

18 A I don't believe so.

19 Q Did you --

20 THE COURT: Excuse me one second. I have to
21 interrupt. We just blew through what is probably the most
22 significant question in this trial which is what were the
23 arguments that the city was using to -- in support of its
24 request to get a discount on the termination fee.

1 I promise.

2 THE COURT: You're going to what?

3 MR. SHUMAKER: I am going to get there.

4 THE COURT: Okay.

5 MR. SHUMAKER: I was -- I was leading up to that.

6 THE COURT: Okay. So this was like a preview.

7 Okay. If -- if that's your plan, I will let you pursue it.

8 Otherwise, I was going to.

9 MR. SHUMAKER: Okay. Hopefully, I'll cover
10 everything that Your Honor is -- is interested in. And I do
11 recognize what Your Honor is interested in.

12 Q I believe my question was, Mr. Orr, was why did you think
13 at this time when the negotiations were going on, in the May,
14 June time frame, that the -- the swap counter parties might
15 trap the casino revenues when they hadn't previously?

16 A Well, there have been multiple events of default as I
17 have mentioned with me as well. And also to the extent there
18 were other litigation risks, it appeared that -- at least to
19 us, it appeared that the parties had come to sort of a head in
20 their respective positions.

21 We also could not operate on the basis that hope was a
22 strategy for stabilizing the city's finances given the
23 precarious nature that they were going into that we were
24 having a very significant financial crisis at the time. So

25 the concept that they would forbear indefinitely was not

1 reasonable.

2 Q And during this time were you -- fair to say that the --
3 the city was -- you started considering thinking about a
4 filing of bankruptcy for the city, correct?

5 A Yes, I think that's fair.

6 Q If you were -- if the -- if the possibility of a
7 bankruptcy filing was out there for you, why were you
8 concerned about the banks and the casino revenues?

9 A Well, I -- I believe in consultation with our attorneys,
10 there was a possibility that the swap counter parties wouldn't
11 be bound for several -- by several provisions of the
12 Bankruptcy Code by the automatic stay and would still be able
13 to exercise their security interest.

14 Q And do you -- do you recall the -- the provisions that --
15 that were coming into play?

16 A I don't have the Code in front of me, but I think
17 362(a)(17) and don't quote me on this, there are a lot of
18 attorneys, 546.

19 Q I'm not trying to quiz you. I -- is the --

20 A I just don't remember.

21 Q Is the term a safe harbor --

22 A Safe harbor provision, sure. There's the safe -- I'm
23 just -- I don't remember the specific Code provision.

24 Q Okay. And I'm sorry. What would the -- what would the
25 safe harbor have allowed the banks to do arguably?

1 A The safe harbor provision allows banks with -- with
2 interest of -- of this kind to execute on their security
3 interests.

4 Q Around this time of -- of negotiation, was there any
5 interruption in the negotiation process?

6 A Oh, sure, yeah.

7 Q And -- and who in your mind interrupted?

8 MR. HACKNEY: Your Honor, I'd like to interpose an
9 objection if I could. I think he's about to go down a pathway
10 that I construed the Court to have determined to be collateral
11 by excluding Ms. Schwartzman's testimony. This is about
12 Syncora and whether it impacted the negotiations that were
13 ongoing and I do think that this is a sufficiently collateral
14 matter that is just not relevant to the proceeding. But to
15 the extent we're going to delve into it, then it gets into the
16 sort of who said what to whom and why didn't various things
17 happen.

18 MR. SHUMAKER: Well, Your Honor, the importance of
19 the casino revenues and what Mr. Orr's testifying to is -- and
20 its critical importance was what Syncora was -- was up to and
21 that's why the witness' account of what the city -- how the
22 city approached that issue and what it might do and what it
23 did in order to protect those casino revenues is -- is
24 important.

1 Buckfire testified yesterday why he was also heavily involved,
2 to the extent they want to introduce testimony that Syncora
3 sought to trap the revenue and that impacted the desire to
4 conclude the negotiations, I don't have a problem with limited
5 testimony to that effect.

6 As you get into the temporary restraining order that was
7 obtained on an ex parte basis and whether that was
8 appropriately obtained, or whether we were sitting around
9 waiting for them to turn a confidentiality agreement to us,
10 all of the things that were in the testimony that we wanted to
11 introduce, I think you cross over to a point where it -- it
12 becomes prejudicial for us to have them tell their side of the
13 story and I do believe it's also -- I think it's collateral.

14 MR. SHUMAKER: And, Your Honor, I -- I don't plan on
15 going into this in any significant detail.

16 THE COURT: Well, I'll let you proceed with the
17 understanding that you are potentially opening up doors you
18 don't want to open. And I'll leave you to decide whether to
19 take that risk.

20 Q Let me switch to this, Mr. Orr. Let -- let me ask you,
21 when did you reach a final agreement with -- with the swap
22 counter parties?

23 A We reached an agreement in principal on June, I believe
24 it was June 13th and actually signed a document, I believe July

1 Q So how long did it take from -- from start to finish?

2 A Almost a month and a half approximately.

3 Q Now, in your view as the emergency manager, what benefits
4 does the forbearance agreement provide to the city?

5 A Well, it gives us access, unfettered access to the cash.
6 It gives us a significant discount over and above the par rate
7 of the termination fee. It helps us avoid costly and
8 expensive litigation which is a cost drain on the city.

9 Equally important is it helps stabilizes the city's finances
10 and also allows us an opportunity to get at some well needed
11 services to the citizens of the city.

12 Q Now, so is it fair to say that -- that in your view you
13 achieved your objectives that you started out with in
14 negotiating the forbearance agreement?

15 A Yes.

16 Q Now you talked a little bit about a discount on the
17 termination payment, correct? Do you recall what the original
18 discount percentages were that were negotiated under the
19 forbearance agreement?

20 A Yes.

21 Q And -- and what were they?

22 A The original percentages were -- I believe there was 82,
23 77, and 75.

24 Q And when you say 82, 77, and 75, what -- what do you

25 mean?

1 A There -- there was a -- a sliding scale related to how
2 quickly you could pay the discount and as you went by certain
3 time frames, the discount began to get reduced. So initially
4 if you paid it quickly it was 75%, if you paid it less quickly
5 it became 77%. And if you took out the entire term of the
6 agreement it went to 82%.

7 Q Okay. Now, there have been subsequent amendments to the
8 forbearance agreement, correct?

9 A Yes.

10 Q And the discount numbers have changed and the -- and the
11 date thresholds have changed, is that correct?

12 A Yes.

13 Q And what is your understanding of what the current
14 discount percentages are on the termination payment?

15 A I want to be clear when I say discount. It's the amount
16 that you have to pay. So the discount is actually 25%. And
17 when I say 82, it's actually 18%.

18 Q Right. What -- what are they right now? As we sit here
19 today December 18th, 2013?

20 A Twenty-five and 18%.

21 Q Okay. And do you know when the city must exercise its
22 rights under the agreement in order to get the 75%, by what
23 date?

24 A I think we need to exercise them by December 31st.

25 Q Now did you -- did you approve these discount

1 percentages?

2 A Yes.

3 Q How did you arrive at these percentages?

4 A It was subject to negotiation. We kept pressing and
5 testing how far we could go and they kept resisting and they
6 would hang up and we'd come back and press and test and
7 finally we got to the point where they said those are the
8 percentages that we're willing to accept.

9 If we don't accept those percentages we would not have a
10 deal. We pushed back and said, you know, we have to have 25%
11 because we felt that was a fair discount for a secured
12 interest.

13 Q Okay. Do you believe the city got a good deal with the
14 discount percentages that you approved?

15 A I believe we got the best deal available, yes.

16 Q Why?

17 A Well, as I said during the negotiations, they had broken
18 down several times, literally broken down. Phone calls were
19 hung up and the parties did not speak for several days. And
20 went up -- as I understand it went up to the highest levels of
21 the counter parties organization as far as what they were
22 willing to accept. And in fact we were prepared to
23 potentially pursue litigation if we had to.

24 Q I want to -- I want to focus on that in just a bit, but

25 -- but still in the negotiation phase. I want to ask you a
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1 question which is in connection with your negotiations, did
2 the swap counter parties ask you on behalf of the city to
3 reaffirm their swaps deal with the city?

4 A Yes.

5 Q Did they ask you to reaffirm their collateral rights with
6 regard to the casino revenues?

7 A Yes.

8 Q Did you agree to do so?

9 A No.

10 Q Why not?

11 A Well, we -- we felt there were issues with regard to
12 their rights and we don't want to affirm because we're in the
13 midst of negotiations and wanted to preserve our options if
14 those negotiations fell through.

15 Q During this time of the negotiations, were you looking at
16 the possibility of suing the swap counter parties?

17 A Yes.

18 Q Did you receive legal advice regarding the potential
19 claims the city might have against the swap counter parties?

20 A Yes.

21 Q From whom?

22 A From our attorneys.

23 Q Who were your attorneys? The law firms, how about that?

24 Okay.

25 A Attorneys at Jones, Day and also attorneys at Pepper,

1 Hamilton.

2 Q And that's Mr. Hertzberg at Pepper, Hamilton?

3 A Yes.

4 Q Why was Pepper, Hamilton involved?

5 A We had retained Pepper, Hamilton -- Pepper, Hamilton
6 because issues had been raised regarding a potential conflict
7 with Jones, Day and we didn't want to have any issues
8 regarding whether or not we were pursuing potentially any
9 claims against the swap counter parties zealously.

10 Q Now were -- were the Jones, Day lawyers and -- and the
11 Pepper, Hamilton lawyers involved in the meetings and
12 communications with the swap counter parties while you were
13 negotiating the agreement?

14 A Yes.

15 Q Why did you have -- was -- was -- was Ms. Ball one of the
16 lawyers who participated in those calls?

17 A Yes.

18 Q Why did you have both Ms. Ball and Mr. Hertzberg
19 participate in those calls?

20 A Well, we wanted to make sure that they were fully
21 informed and prepared if those calls broke down from the legal
22 perspective to take appropriate relief. There may have been
23 other attorneys involved in those discussions as well. I'm
24 just identifying Ms. Ball, Ms. Bennett, Mr. Hertzberg as the
25 principal ones participating.

1 Q Did those law firms, did Jones, Day and Pepper, Hamilton
2 prepare any legal analyses of the claims that the city might
3 have against the COPS and the swaps?

4 A Yes.

5 Q And those memos were conveyed to you, is that correct?

6 A Yes, I believe so.

7 Q Were any legal analyses prepared by Jones, Day or Pepper,
8 Hamilton regarding the pledge of the casino revenues that was
9 a part of the 2009 collateral agreement?

10 A Yes.

11 Q Without divulging the substance of the communications,
12 the privileged discussions that you might have had with Jones,
13 Day lawyers and Pepper, Hamilton, what kinds of claims were
14 addressed in the memoranda that you saw and/or heard about?

15 MR. HACKNEY: Your Honor, I'll just interpose an
16 objection on two fronts here. The first one is that during
17 the discovery on the forbearance agreement, we were -- we were
18 not actually granted the opportunity to obtain document
19 discovery and they did not provide us a privilege log.

20 But after the testimony of Mr. Orr in which he asserted,
21 I took advice on all these subjects, don't worry, I considered
22 everything and -- and took it into account, I asked counsel to
23 provide a privilege log so the extent to which we could see
24 were memoranda transmitted to Mr. Orr for his consideration.

25 These are complicated legal issues. These aren't the types of
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1 things that you can just process by having a five minute
2 conversation with someone. And I think -- and -- and counsel
3 for the city refused to do that.

4 I think that they are now inquiring of testimony of the
5 witness that I don't have a fair opportunity to cross examine
6 the witness about. Even if it's not the substance of the
7 communication, if they were going to elicit testimony from Mr.
8 Orr about all the different memoranda and email that he
9 concluded that he considered as part of his decision, I think
10 it was incumbent upon them to produce such a privilege log so
11 that we could see that it maps up with the decision time frame
12 that's laid out around the negotiation.

13 MR. SHUMAKER: Your Honor --

14 THE COURT: You received memoranda from your lawyers
15 outlining claims that the city might have in regard to the
16 COPS and the swaps.

17 A Yes, claims and defenses, Your Honor.

18 THE COURT: And you're claiming the privilege as to
19 those memoranda?

20 A Yes, Your Honor.

21 THE COURT: And you're claiming the privilege as to
22 those memoranda even though you want to take \$270,000,000 from
23 the taxpayers of this city to pay to terminate those swaps?

24 A I am claiming the privilege, Your Honor.

1 MR. SHUMAKER: Well, Your Honor, responding to --

2 THE COURT: Just because the -- you have the
3 privilege doesn't mean you have to claim it.

4 MR. SHUMAKER: Well, Your Honor, that's true. But
5 the -- the city has asserted the privilege and --

6 THE COURT: I don't get it. How can I decide
7 whether this was a fair settlement without understanding what
8 the city's assessment of the strength of its claims against
9 the COPS and the swaps were? How can I do that?

10 MR. SHUMAKER: Well, Your Honor, you can do that as
11 I think we set forth in the -- our response to the motion in
12 limine on this point that the objectors filed, it's really an
13 objective standard. And you have the theories laid out by the
14 objectors. This -- this -- the city has, you know, asserted
15 the privilege, but obviously the consideration of those
16 claims --

17 THE COURT: Why has the city asserted the privilege?

18 MR. SHUMAKER: Well, Your Honor, it's not my
19 privilege, but --

20 THE COURT: I'm asking you. You're their lawyer.
21 Why have you asserted it?

22 MR. SHUMAKER: Well, Your Honor, you know, this is a
23 -- it is a well known effort to protect the city with regard
24 to its communications between, you know, its client and its
25 lawyers. The free exchange of ideas is critical to the

1 system.

2 And we were negotiating with large banks who would love
3 to have the Jones, Day, or the Pepper, Hamilton memoranda
4 revealed for all the world so it would inform their
5 negotiating position.

6 MR. CULLEN: If I may add one thing, Your Honor.
7 Thomas Cullen for the city. I think, Your Honor, that one of
8 the reasons we haven't disclosed those memoranda, and we
9 didn't want to disclose those memoranda, is that we may still
10 sue the banks. If we are in a position of --

11 THE COURT: All right. Let's walk down -- let's
12 walk down that road for a second. Assume the Court denies its
13 approval of this forbearance agreement and you wind up in
14 litigation, right.

15 They're going to file a complaint, or you're going to
16 file a complaint, or the other -- and -- and regardless the
17 other side is going to file a counter claim and sooner or
18 later you're going to file your motions for summary judgment
19 and answers to motions for summary judgment, or trial briefs
20 and answers to trial briefs, it's all going to come out.

21 MR. CULLEN: Your Honor, perhaps not -- not
22 suggesting to split the baby here, but we did have --

23 THE COURT: Let's pause. Let's just take a pause
24 here. It's a little early for lunch, but we're going to take

1 issue over lunch.

2 MR. CULLEN: May I suggest one thing, Your Honor?

3 THE COURT: Yes.

4 MR. CULLEN: There was a draft complaint and perhaps
5 the Court could -- we could certainly waive with respect to
6 that if we weren't on the subject matter waiver provision.

7 THE COURT: Let -- let -- let's reconvene at, it
8 will be 1:15, 90 minutes from now and -- and -- and you think
9 about what position to take that's in the best interest of the
10 city.

11 MR. CULLEN: I understand, Your Honor.

12 THE COURT: All right. We're going to be in recess.

13 (WITNESS KEVYN ORR WAS EXCUSED AT 11:43 A.M.)

14 THE CLERK: All rise. Court is in recess.

15 (Court in Recess at 11:43 a.m.; Resume at 1:18 p.m.)

16 THE CLERK: All rise. Court is in session. Please
17 be seated. Recalling case number 13-53846, City of Detroit,
18 Michigan.

19 THE COURT: It appears that everyone is here. Mr.
20 Shumaker.

21 MR. SHUMAKER: Good afternoon, Your Honor. Over
22 lunch I have to confess that I was thinking about what Your
23 Honor had told us at the pre-trial conference on Friday about
24 the proponent of a settlement being in a -- an awkward

25 position in its approach to how it discusses or it doesn't --
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1 at the same time -- at the same time asking for settlement of
2 the claims, it does not reveal the strengths and the
3 weaknesses in case the -- the Court decides that it can't
4 approve the settlement. And I've -- and I've kind of -- think
5 we find ourselves in that awkward zone.

6 We interpreted what you were saying, Your Honor, that you
7 did not want to know what Jones, Day or Kevyn Orr, or any of
8 the employees thought about the strengths and weaknesses of
9 the -- the case. You thought we were asking what did he
10 consider and were memoranda prepared. Did you receive advice
11 from counsel, were there -- was all of that considered. So
12 again I stand here awkwardly, or hopefully less so after --
13 after a busy lunch.

14 With regard to what your -- Your Honor has requested, I
15 guess my -- my answer is -- is twofold in nature. One, we
16 have -- I'm going to admit that there was a bit of scurrying
17 in the lunch and we have pulled together a -- a packet of what
18 I think Your Honor would find under normal circumstances
19 clearly privileged attorney/client communications and
20 attorney/client work product. And including draft complaints
21 that were prepared.

22 And in trying to figure out what to propose to Your
23 Honor, Rule 502(d) comes to mind of -- of the Federal Rules of
24 Civil Procedure. I'm not sure -- oh, I'm sorry, the Federal

1 controlling effect of a Court order. A Federal Court may
2 order that the privilege or protection is not waived by
3 disclosure connected with the litigation pending before the
4 Court in which event the disclosure is also not a waiver in
5 any other federal or state proceeding.

6 If Your Honor would like us to, we can make a motion or
7 Your Honor could, I imagine issue an order pursuant to 502(d)
8 right now in which we -- the city would provide those to Your
9 Honor and if Your Honor believes that we need to publish those
10 to the world, we will publish those to the world. If -- if
11 you're able to -- if the Court is --

12 THE COURT: I don't -- I have to interrupt you here.
13 I don't want you to misunderstand what my request was. I was
14 not requesting you to disclose privileged information. My
15 request was that you consider whether maintaining the
16 privilege is in the best interest of the city. That was my
17 request.

18 If you come to the conclusion it is, and you think you
19 can prove what you need to prove to get this settlement
20 approved, go for it. I think your challenge is more difficult
21 if you maintain the privilege. It's not impossible. That was
22 -- and I apologize to you if I wasn't clear enough on that
23 point.

24 MR. SHUMAKER: No, no. Yeah, I was just --

25 THE COURT: You know, that's -- that's it. I will
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1 say in hindsight now that I understand what the issue was
2 regarding the privilege log that Mr. Hackney had raised, that
3 if I had understood when that motion was addressed briefly as
4 it was the other day, that these memos were the subject of
5 that request for a privilege log, I certainly would have
6 ordered it. And in fact I do order it now, I'm going to
7 change my order on that and order a privilege log.

8 MR. HACKNEY: So I have to clarify for the record,
9 Your Honor, to be very precise, there is actually a -- a
10 meaningful distinction about what you and I were talking about
11 on Friday and this issue. And if I could clarify it.

12 THE COURT: Oh, all right. Go ahead.

13 MR. HACKNEY: On the original forbearance agreement,
14 we were not entitled to any discovery period at the end of our
15 colloquy. And then after Mr. Shumaker indicated that this
16 would be an evidentiary hearing, the Court then said, okay.

17 THE COURT: Right.

18 MR. HACKNEY: I'll let you take depositions. But we
19 weren't allowed to engage in written discovery. And when you
20 engage in written discovery, that's what triggers the
21 privilege log coming back because that's what they withhold.

22 The privilege log you and I were talking about on Friday
23 was with respect to DIP discovery where we were entitled to
24 issues in written discovery and then they did not give us a

1 THE COURT: Okay. That was -- so that -- that was
2 my disconnect, okay.

3 MR. HACKNEY: Yes, sir. And I -- I wanted to
4 clarify that, but on the forbearance agreement after we went
5 through the depositions and there was the repetitive assertion
6 of the privilege, which I understood. I understand the
7 position that's being taken.

8 What I then said to the city was, I know I haven't been
9 given the right to take written discovery, but given the
10 widespread assertion of the privilege, and the complexity of
11 the issues, won't you please agree to produce to me a
12 privilege log so that what we could do is we can see --

13 THE COURT: Okay.

14 MR. HACKNEY: -- the deliberative process. Because
15 you'll see the memoranda and the email going to Mr. Orr on the
16 relevant issues.

17 You do have to disclose the subject matter of a
18 communication, even if you don't disclose the communication
19 itself. Then we'd be able to test the proposition that don't
20 worry, I considered the gambit of the issues. That's the
21 privilege log, it was a voluntary request.

22 My objection today was simply that having rejected that
23 request, I do think that they have now put the objectors in a
24 position where it's difficult to meaningfully cross examine

25 Mr. Orr even on the subject of what he considered. Because

1 you don't have access to seeing the -- the communications go
2 to him.

3 MR. SHUMAKER: And if I could address that, Your
4 Honor. At Mr. Orr's deposition, objectors count on the
5 assumption motion back when it was Your Honor's order was that
6 the city just proffered whoever was going to testify in
7 support of the assumption motion.

8 The -- the objectors' counsel did ask a number of
9 questions about what sort of topics, what sort of claims did
10 you consider Mr. Orr. And he was allowed to answer those
11 questions. That is similar to what you would find on a
12 privilege log.

13 But when they went deeper and they started asking what
14 about -- what were the likelihood of success on the merits
15 there, that's when I said that is invading the privilege.
16 That's how I drew the line.

17 And so in effect I think the objectors have the kind of
18 information that they would have received in connection with
19 the privilege log had we -- had there been written discovery
20 in connection with the assumption motion. And frankly, Your
21 Honor, that was what I was going to be asking Mr. Orr about.

22 THE COURT: So I -- I take it that it is -- it is
23 still the city's judgment that it is in the best interest to
24 maintain the claim of privilege as to whatever legal memoranda

1 the swaps?

2 MR. SHUMAKER: I have consulted with -- obviously,
3 Your Honor, it's the client, the city's decision.

4 THE COURT: Right.

5 MR. SHUMAKER: Mr. Cullen and I were given -- were
6 -- had very little time to speak with Mr. Orr prior to him
7 walking into the courtroom after lunch. And we simply posited
8 to him what we were going to propose the -- the twofold
9 proposal that I was going to make to Your Honor. We did not
10 ask do you want to fully waive the privilege which -- which we
11 could do if Your Honor would like us to do that.

12 THE COURT: Well -- sir?

13 MR. CULLEN: To -- to be hopefully slightly more
14 clear. What we said to Mr. Orr, or what we're saying to the
15 Court, is that we're willing to make A, these documents
16 available. We would like to have a 502(d) order with respect
17 to those documents which would restrict the waiver -- it would
18 make the documents available, but the privilege would not be
19 waived, the documents would be made available --

20 THE COURT: Available to the Court and to the
21 objecting parties?

22 MR. CULLEN: And to the objecting parties. As long
23 as they weren't waived.

24 Now, the other thing because we've changed direction on
25 the nature of the evidence to some degree, we also in the

1 interest of fully informing the Court of the other questions
2 that the Court pressed, one of them being what exactly was
3 conveyed in terms of the -- how are these theories used in the
4 negotiations in -- in detail.

5 What we would propose is the following. And this would
6 save the -- this would address both the Court's issue with
7 respect to the underlying memoranda and with respect to the
8 subject matter of those meetings.

9 We would propose to make Ms. Ball as a percipient witness
10 at those meetings who is charged with Mr. -- charged by Mr.
11 Orr with both formulating those theories and conveying them in
12 negotiations with the other side about potential litigation.

13 I don't know whether we'd call her a rebuttal witness or
14 not, profess to make her available for a deposition on those
15 topics and to authenticate those documents, many of which Mr.
16 Orr would not be in a position to authenticate even if he had
17 -- if he had seen them or not.

18 So what she would do -- what we would do, and propose to
19 the Court, is that we'd make Ms. Ball available for deposition
20 tonight and we'd put her on tomorrow with respect to those
21 issues. And they -- that we would make available for that
22 deposition -- for that deposition, the documents that we have
23 gathered which fit Your Honor's discussion here which are the
24 memos relating to the claims against the banks which were the
25 subject matter of the negotiations.

1 We have -- we may find some more, but we -- as of right
2 now, we have a -- a group of oh, maybe 25 documents that fit
3 that description including two draft complaints.

4 THE COURT: Including what?

5 MR. CULLEN: Including two draft complaints.

6 THE COURT: Mr. Hackney.

7 MR. HACKNEY: So this is sufficiently material that
8 I -- I do at some -- you know, I don't speak for the objectors
9 and I guess I have one suggestion.

10 Which is, I know the evidence and I question the
11 relevance of Ms. Ball's proffered testimony. And perhaps I
12 can make a suggestion to the Court.

13 Perhaps the Court might reserve its decision about this
14 until the end of Mr. Orr's cross examination. And also
15 perhaps until after I've been able to caucus with the
16 objectors. Because I, based on my knowledge of the record, I
17 do not understand how Ms. Ball's testimony would materially
18 change what we are talking about right now.

19 MS. ENGLISH: Your Honor, may I speak?

20 THE COURT: Yes.

21 MS. ENGLISH: I would just like to make two points
22 here and again I -- I would also echo Mr. Hackney's comments
23 that the objectors would like to caucus on these new
24 developments first.

1 think the assertion of privilege in the depositions of Mr. Orr
2 and Mr. Buckfire were much broader in fact than Mr. Shumaker
3 has represented to the Court.

4 In fact in Mr. Orr's testimony, I just want to read a
5 couple of lines to you, please. Mr. Hackney asked Mr. Orr
6 about what claims were being settled by the forbearance
7 agreement that the city had against the swap counter parties.
8 He said, and if I ask you to tell me what claims you have,
9 will you tell me or will you assert the privilege? Mr.
10 Shumaker responded, I would instruct the witness that that may
11 implicate attorney/client communications. And Mr. Orr then
12 responded, I would have no independent knowledge of what
13 claims the city may have other than discussions I've had with
14 my counsel so I would not answer. So I think the claim of
15 privilege was much broader.

16 The second point I would like to make is because the
17 assertion of privilege was made so much throughout the city
18 witnesses depositions, the city must be precluded from now
19 admitting privileged as evidence, waiving the privilege and
20 admitting that in trial. And opening up -- allowing us to
21 take a deposition of Ms. Ball would not be sufficient.

22 We would need to re-depose Mr. Orr and Mr. Buckfire and
23 possibly examine what other witnesses need to be deposed as
24 well as a result of this new development. Thank you, Your

1 MR. SHUMAKER: Your Honor, just to respond quickly
2 on the assertion of privilege. Let me read another quote,
3 this one from Ms. English at the -- the deposition of Mr. Orr
4 which was question from Ms. English. "Can you just list for
5 me what the topics were ..."

6 THE COURT: What page are you on?

7 MR. SHUMAKER: Page 16, Your Honor, of the objector
8 -- I mean the city's opposition to the objectors motion in
9 limine. It's Footnote 5. Ms. English asks, "can you just
10 list for me what the topics were on which you got advice or
11 would you claim the privilege as to just the topics as well?
12 Mr. Orr, maybe I can do it this way. I think I've said before
13 that in this case for instance your client Ambac, I filled
14 that in, has filed an objection. Ms. English, yes, it has.
15 Mr. Orr's response, and in this case many objections have been
16 filed and many of the topics listed in those objections,
17 whether it was subordination, prioritization, equitable
18 estoppel, tort, invalidation of liens ab initio, whatever they
19 were, none of those analyses or claims came as a surprise to
20 me and that in some fashion without divulging what I had
21 spoken with to my counsel, in some fashion issues such as
22 those have been discussed and analyzed with my counsel,
23 attorneys, and advisors".

24 I don't think Ms. English is -- is giving you an accurate
25 picture of what happened there. There was a lot of assertion

1 of privilege because of the awkwardness that Your Honor had
2 noted.

3 And so we were trying to draw the line in a way that was
4 permissible and allowed the objectors to get at the kind -- we
5 talked a little bit about this, Your Honor, in the opposition
6 too which is really it's for Your Honor, it's not for Mr. Orr
7 to decide -- he obviously has to make a decision as to whether
8 -- whether to enter into the agreement, but you have all of
9 the claims spelled out for you.

10 And -- and it's your -- you know, your decision, your
11 objective decision as to whether it was reasonable to
12 compromise those claims. And we also quoted in that --

13 THE COURT: Here's the -- here's the difference.
14 You know, I -- I think back to the hundreds or thousands of
15 motions to settle that I have been called upon to determine in
16 the last 28 1/2 years. And in virtually every one of those
17 cases, everyone knew what the claims were, what the defenses
18 were, what the factual -- the alleged factual bases were for
19 those claims, the alleged factual bases for the defenses, and
20 where the strengths and weaknesses were on either side.

21 I don't have that here. Not -- not from your brief and
22 not yet at least from Mr. Orr. I certainly didn't get it from
23 Mr. Buckfire. So I'm at a loss as to how to evaluate the
24 fairness of the settlement without that data.

1 THE COURT: And so I -- and I think the burden is on
2 the city to -- to -- to show the fairness of the settlement,
3 right?

4 MR. SHUMAKER: Correct, Your Honor.

5 THE COURT: So you know, this is -- in the end it's
6 your call. I mean you have to decide how you want to persuade
7 me regarding the fairness of this settlement if you -- and if
8 you fail, the motion is denied. You don't want that.

9 MR. SHUMAKER: Understood.

10 THE COURT: At least I don't think you do.

11 MR. SHUMAKER: That's correct, Your Honor. And I
12 guess the -- the -- for the Court's consideration is this.
13 Although this is not your normal 9019 situation.

14 You do -- the Court does know what the -- the subject of
15 the -- of the potential legal attacks are, the -- the swaps
16 and the -- the pledge of the collateral. And at -- at this
17 stage, given all the different considerations that were going
18 on and that have been described to you with regard to the
19 city's financial condition at the time of May to June and the
20 May numbers came in and they were much worse than anyone
21 thought. And the -- the city had very limited time.

22 I would suggest that Your Honor you -- there is no full
23 factual record here for you to review because the settlement
24 decision had to be made very quickly under the dire

25 circumstances that Mr. Orr and the city faced.

1 And so you do have the theories. You do have the
2 subjects. You do have Mr. Orr who will say that I was given
3 plenty of legal memoranda and -- and emails and -- and
4 counsel. And then if Your Honor believes that that's not
5 sufficient, I mean I agree that there is a decision that --
6 that -- that we need to make. And that's why we're trying to
7 find a compromise.

8 THE COURT: Since you've raised the question, I'm
9 going to say this to you. Every transaction, including this
10 one, that the city has entered into in connection with these
11 swaps and COPS has been with a gun to its head.

12 That has to stop. It has to stop. And -- and I think
13 it's part of a Bankruptcy Judge's role to carefully scrutinize
14 a debtor's request to approve a settlement when that
15 settlement was made with the debtor's -- with a -- with a gun
16 to the debtor's head. I mean --

17 MR. SHUMAKER: We dare not agree -- we could not
18 agree to --

19 THE COURT: Just one more thought.

20 MR. SHUMAKER: I'm sorry.

21 THE COURT: And the reason is obvious. Because, you
22 know, it's not just the debtor who is impacted by this, right.
23 I got a whole courtroom full of people who are impacted by
24 this.

1 know, if you want me to do that, I'm happy to. If you -- if
2 you want to take your chances, that's your call.

3 MR. SHUMAKER: Two responses to that, Your Honor.
4 First, we couldn't be in more complete agreement. Under the
5 circumstances they were not perhaps ideal given the financial
6 emergency that was in place.

7 Mr. Orr came in in April. The numbers that Mr. Malhotra
8 and Ernst and Young provided in May showed holy cow, we're
9 running out of time. And so no one likes to make a decision
10 with a gun to their head, but a big big reason why we believe
11 that this -- this forbearance agreement is necessary and the
12 post-petition financing is needed to finance it, is to
13 stabilize the city. That is exactly what we're trying to do.
14 We don't -- we know it's not ideal, but this is how we come to
15 -- that's how Mr. Orr came to the -- came to the problem.

16 THE COURT: You know, stabilizing the city is
17 exactly what motivated the original swaps and COPS. And it's
18 exactly what motivated the 2009 transaction and look where we
19 are.

20 MR. SHUMAKER: It's not a great spot, I agree with
21 Your Honor. But that's why Mr. -- a financial emergency was
22 declared and Mr. Orr was put in to take the steps necessary to
23 right the ship. And I don't know how he can right the ship
24 without keeping these casino revenues available to the city so
25 they can be used to do bigger and better things as opposed to,

1 you know, serve as collateral that can be tied up by a couple
2 of banks for as long as they want. Which is the -- the
3 difficult decision Mr. Orr faced.

4 THE COURT: Of course, but the question is whether
5 you're overpaying for that, right?

6 MR. SHUMAKER: Yes, Your Honor.

7 THE COURT: Or one -- one of the questions.

8 MR. SHUMAKER: Yes, Your Honor.

9 THE COURT: And that depends -- I don't know why the
10 considerations for that determination in this case should be
11 any different than in any of the other hundreds or thousands
12 that I've dealt with.

13 MR. SHUMAKER: Understood, Your Honor. And I guess
14 that's why we -- we tried to come up with a compromise over
15 lunch which was if Your Honor's willing to enter the 502(d)
16 order so that there's no some broad expansive waiver, and if
17 Ms. Ball can get on the stand and explain what -- what the
18 advice that you will see is and how that was communicated to
19 the other side, you clearly are going to be in a much much
20 much better position to be able to determine whether the city
21 is overpaying.

22 THE COURT: Well, let me ask the -- well, the
23 objecting attorneys have -- or the attorneys for the objecting
24 parties have requested an opportunity to -- to caucus

25 regarding this and I think it is appropriate to grant that.

1 How much time would you like?

2 MR. HACKNEY: Can we have 20 minutes?

3 THE COURT: Absolutely.

4 MR. HACKNEY: Can we reconvene at 2:00, Your Honor?

5 THE COURT: Yes. We will reconvene at --

6 MR. HACKNEY: Yeah.

7 THE COURT: I'm sorry?

8 MR. HACKNEY: Whatever works for you. I'm sorry.

9 THE COURT: I'm here regardless. So let's say 2:00.

10 If you find you need a few more minutes, you know, we'll work
11 that out. In the meantime, I urge -- I urge you all to
12 consult among yourselves on both sides to see what the best
13 way to resolve this is.

14 MR. SHUMAKER: Thank you, Your Honor.

15 THE CLERK: All rise. Court is in recess.

16 (Court in Recess at 1:42 p.m.; Resume at 2:00 p.m.)

17 THE CLERK: Court is in session. Please be seated.

18 MR. HACKNEY: Your Honor, can I approach the podium?

19 THE COURT: Yes. Which reminds me, I've been asked
20 to remind everyone again that -- that when you address the
21 Court to speak near a microphone, not only so that it's on the
22 record, but so that the people in the overflow courtrooms can
23 hear as well.

24 MR. HACKNEY: Will do, Your Honor. Thank you for

25 that.

1 Your Honor, the objectors have caucused together and what
2 we did was we basically articulated kind of broad principals
3 and order and then determined that there was no objection to
4 my relaying this to the Court on behalf of all of the
5 objectors.

6 THE COURT: Okay.

7 MR. HACKNEY: That's the easiest way to operate when
8 you have a lot of people.

9 THE COURT: Yes.

10 MR. HACKNEY: So, Your Honor, with respect to the
11 idea that they might produce these memoranda that they're
12 referring to, and then produce Ms. Ball for a deposition in
13 the nighttime tonight that we would -- and then she would then
14 testify tomorrow.

15 The objectors do not believe that that proffered
16 testimony would be relevant. Because, Your Honor, the record
17 shows, and I can relay additional record evidence that's not
18 yet in the record, but is about to be, moments from now. But
19 the record for Mr. Buckfire's testimony shows that he was the
20 lead negotiator on the deal. That he had not evaluated any of
21 the claims of the city and that he was unaware as to whether
22 anyone else had done so either at the time he was negotiating
23 the deal.

24 That he never argued the city's case to the swap counter
25 parties. And that he never witnessed anyone else do so

1 either. That testimony, I think, is -- is compelling
2 testimony and what they now want to do is they effectively
3 want to rebut their own case by calling in Ms. Ball to back
4 and fill and say no, I was -- I was heavily involved in
5 arguing and threatening the swap counter parties and fully
6 apprised of all the various issues.

7 We don't think that Ms. Ball's testimony is sufficient to
8 contradict the record evidence of Mr. Buckfire's testimony
9 that he was the lead negotiator on this deal and that he never
10 saw anyone else do this and is unaware of it. We think that
11 -- that -- that the city --

12 THE COURT: Well, assuming what you say is true, I
13 don't know that it is, but assuming it is for this -- for this
14 purpose, that doesn't make the testimony inadmissible, does
15 it?

16 MR. HACKNEY: Well, it would --

17 THE COURT: It may go to its weight, but does it go
18 to its admissibility?

19 MR. HACKNEY: I -- well, I think what you would say
20 is that it doesn't make it inadmissible because the two
21 witnesses can contradict each other. And she can come in and
22 say, oh, here's all the stuff that Mr. Buckfire somehow forgot
23 happened on the deal that he was the lead negotiator on.

24 Okay. Fine, it's a theoretical matter. But the idea

1 the list where the city insisted that only those witnesses
2 testify, and that the only other people that could be
3 identified by a date certain were rebuttal witnesses.

4 That they're now going to add a witness as a rebuttal to
5 their own case before their case in chief is done. That's out
6 of the order and prejudicial to us and now we have to take the
7 rush deposition.

8 But in addition, I think what the Court can do, is the
9 Court can say, I saw Mr. Buckfire testify and I'm not going to
10 allow you to back and fill your way out of that. And I'm not
11 going to go through extraordinary steps to do it. And that's
12 our second point.

13 Which is if you decide that given the -- the significance
14 of this settlement and all that goes into it, consistent with
15 the comments that you've made, that you want to hear the
16 testimony and you want to see the documents. You think that's
17 appropriate to your decision.

18 Then we -- we will understand that. But then we will
19 say, we have got to do this in an orderly way. That --

20 THE COURT: I'm just going to stop you there.
21 Because I -- I view what I want as irrelevant. It's not my
22 motion.

23 MR. HACKNEY: Let me rephrase if I could. If the
24 city decides no, you know, we have to do this. We -- we are
25 going to give these documents. We've decided to change our

1 case in response to the Court's comments. We have to have Ms.
2 Ball testify. Then our point is that this must be done in an
3 orderly way.

4 THE COURT: Uh-huh.

5 MR. HACKNEY: And that means not just a rush
6 deposition of Ms. Ball tonight with the five documents that
7 they picked out and said look at these. It's let's get order
8 to the discovery. Let's get order to the -- where the
9 privilege being asserted, where not.

10 Let's take the depositions in an orderly way and Mr. Orr
11 is going to, you know, hate me for saying this, but we will
12 have to re-depose certain witnesses. I mean when you roll out
13 with these -- these documents --

14 THE COURT: He won't -- he won't hate you.

15 MR. HACKNEY: Well --

16 THE COURT: He may dislike you, but he won't hate
17 you.

18 MR. HACKNEY: These are --

19 THE WITNESS: Well, Your Honor.

20 MR. HACKNEY: We teach our -- at work we teach our
21 daughters that you're not supposed to say hate, but I think
22 that --

23 THE COURT: Right.

24 MR. HACKNEY: -- people actually do hate

1 THE COURT: All right. I'll accept that.

2 MR. HACKNEY: So that -- that was our second point
3 which -- and the only thing we wanted to say though was in
4 support of this idea that if the city changes and says, here
5 you go, here's all the stuff that we relied upon and here's
6 Ms. Ball who was the legal eagle on the deal.

7 You know, we articulated in the motion in limine that we
8 filed a long time ago in anticipation of the first hearing,
9 this was a big issue for us. Because we had lived through the
10 depositions and had raised the questions and seen the
11 assertion of the privilege.

12 And, you know, I think that the city waiting all the way
13 until the last week, I think on the 9th, even to respond to
14 that in limine motion. And I think that should factor in
15 somewhat to the Court's consideration of whether if the city
16 decides to go in this fashion, whether it will allow the types
17 of rush depositions that are sometimes appropriate in
18 different contexts where it's like sufficiently not material
19 that you're like oh, we're just going to get it done and
20 you'll have to stay up late and do a cross tomorrow, but you
21 can do it.

22 This is core. So given that we put this issue out there
23 to try to join issue on the city with it and the city, you
24 know, didn't respond until recently and has now sort of

1 limine, now we're thinking about saying we kind of agree with
2 it. That's a sufficiently material change. I think it should
3 factor in to your consideration of the time line. If I can
4 make one last comment.

5 The gun that's to our head in this case from the
6 standpoint of schedule, you know, at first it was the discount
7 posts in the forbearance agreement. You know, so it's like we
8 got it -- you know, this was the way there was a -- you talked
9 about a gun to the head of the city. There was a little bit
10 of a gun to all of our heads under the schedule. Because it's
11 like we have to do this by this time to get this by this time.

12 But then the original hearing was just adjourned for
13 several months and it turned out the discount post extended
14 out by four months when they -- after the hard fought
15 negotiations had only been able to get like six weeks.

16 Now there's -- that's a bit of a gun at our head, is now
17 it really expires on December 31 and so we have to get it
18 done. And then also is the Barclays commitment expires on
19 January 7th.

20 That's another gun to our head from a scheduling time
21 frame. And given -- I will say given the holidays, this --
22 these all don't go together very well if we adopt this second
23 course.

24 And what I wanted to say is that if we go this way, I've

1 potential DIP lenders and ask them about certain provisions in
2 their agreements and ask them, is that -- that January 7th, you
3 know, as firm as it says there in black and white. And -- and
4 in some instances, Your Honor, and we often heard debtor's
5 counsel as well, but it turns out that -- that it was
6 flexible.

7 And I think that if we -- I know that we don't know which
8 way we're going. But if we're going to go this second way,
9 can't we have a practical conversation about this? Because
10 this scheduling gun to our head, and this is isn't a harangue,
11 it's an observation.

12 It's -- it's infected everything. It's infected how much
13 discovery we did, the scope, the pace of discovery, and it's
14 had an impact on our ability to present the case to you -- to
15 you. Bless you, Mr. Orr.

16 And I think that you've made observations today about the
17 magnitude of this transaction and its significance that if we
18 could get a little bit of the gun stopped to be pointing at
19 our head as we're considering this idea of what's the schedule
20 going to be, what is the process going to be from the
21 standpoint of discovery. If we go that second way, I think
22 that will be important to the objectors. That's all I have to
23 say, Your Honor. I don't know if other objectors would also
24 like to be heard, but that -- that's the consensus. Thank

25 you.

1 THE COURT: Thank you. Mr. Shumaker.

2 MR. SHUMAKER: Your Honor, a couple of points.

3 First of all, Mr. Hackney has talked about how important this
4 issue of the assertion of the city's privilege has been to the
5 objectors for a long time.

6 Your Honor should not think that this was anything other
7 than calculated from the beginning. Back when Mr. Orr was
8 deposed, the first question that Mr. Hackney asked was, Mr.
9 Orr, in the course of negotiating and executing the
10 forbearance agreement, did you receive legal advice? Answer,
11 yes.

12 And then five questions later, after some predicate, who
13 did you get the legal advice from. Five questions later, from
14 Mr. Hackney. Are you waiving the attorney/client privilege in
15 connection with the motion to assume the forbearance
16 agreement? When that answer was no, that led to about 50
17 questions intended to invade the city's privilege.

18 In that motion in limine, opposition that Mr. Hackney
19 referred to, that the city has put forth, it's been very clear
20 in the -- in the Washington Mutual case, which I believe is in
21 the Bankruptcy Court in one of the districts in New York, the
22 agreement was very clear that with regard to this kind of
23 motion you do not need to waive.

24 So that's one thing. I think that this -- the notion

25 that this was a surprise and holy cow, this was a tactic. It
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1 was a tactic from the get go. The second thing, is that this
2 gun is not going away.

3 THE COURT: Look, everyone uses tactics. The
4 question when you talk about tactics is, is it -- is it a
5 legitimate tactic, right?

6 MR. SHUMAKER: Well --

7 THE COURT: You can't say it was illegitimate.

8 MR. SHUMAKER: No, and I --

9 THE COURT: I asked the same questions just before
10 lunch that Mr. Hackney asked in -- in this deposition that you
11 quoted from.

12 MR. SHUMAKER: I was not suggesting you were
13 undertaking a tactic, Your Honor, not in the least.

14 THE COURT: Okay.

15 MR. SHUMAKER: But I -- but I -- but I was -- I was
16 commenting on it because -- because of the awkward position
17 that the city finds itself in. And it does not believe it
18 needs to waive but --

19 THE COURT: Well --

20 MR. SHUMAKER: Appreciate your honest concern.

21 THE COURT: But as far -- you know, as I've said
22 before, the burden is on -- if you want to -- to put these
23 memos in with this 502(d) order we can talk about that. If
24 you want to call Ms. Ball, we can talk about how to -- how to
25 properly create an orderly process to do that.

1 But as I said before, this -- this approval will get the
2 closest scrutiny from me and it's your burden. So, you know,
3 you have to decide what you want to do to -- to meet that
4 burden.

5 MR. SHUMAKER: Yes, Your Honor. Perhaps --

6 THE COURT: And I can tell you, that I agree with
7 Mr. Hackney. That if -- if we're going to open it up in the
8 -- in the ways that you and Mr. Cullen have -- have suggested,
9 it's not going to be done today and tomorrow. And I'm not
10 available between December 22nd and January 1st.

11 MR. SHUMAKER: May I consult with my colleagues,
12 Your Honor, for a minute?

13 THE COURT: How much time would you like?

14 MR. SHUMAKER: Ten minutes, Your Honor.

15 THE COURT: Mr. Hertzberg says you want ten minutes.

16 MR. SHUMAKER: Yes, please, Your Honor.

17 THE COURT: We'll be in recess for ten minutes.

18 MR. SHUMAKER: Thank you, Your Honor.

19 THE CLERK: All rise. Court is in recess.

20 (Court in Recess at 2:13 p.m.; Resume at 2:41 p.m.)

21 THE CLERK: All rise. Court is in session. Please
22 be seated.

23 MR. CULLEN: Good afternoon, Your Honor.

24 THE COURT: Sir.

25 MR. CULLEN: The city would like to -- to propose

1 the following. If that -- if it makes sense to the -- to the
2 Court.

3 Given the Court's guidance, given the procedural posture
4 we're in now, given the concerns of the objectors about the
5 ripeness of the various issues in front of us, and given our
6 need to reach out to other parties to talk about how we can
7 accommodate all of those things, what we would propose is that
8 we and the other parties take tomorrow to try and work out a
9 procedural schedule for your -- Your Honor.

10 We will in that -- in the course of that time, to be
11 frank with all concerned, we'll have to -- we will be reaching
12 out to the -- the counter parties, the Barclays about what we
13 can do with them.

14 In our discussions with the objectors, we will be talking
15 about various things, including the -- the options I've laid
16 forth before the Court and see if we can get the -- we can
17 cabin those in such a way so that we can get the right
18 discovery and the right things in front of the Court. And --
19 and get to the Court -- do something within the Court's
20 schedule and in a way that will allow us to stop the city
21 paying money on a notional \$800,000,000 rather than the amount
22 of 270,000,000, the settlement amount.

23 So that's all the things we're going to try and
24 accomplish tomorrow to make this easier. I can also tell the

1 questions about the various underlying deals and the history
2 and the issue of -- of -- of gun to the head.

3 The banks who are in the room here and the counter
4 parties in the post-petition financing are also in the -- in
5 the room here. They have been educated as well.

6 We have asked to the objectors to discuss with us
7 tomorrow among the other things that they would discuss, if --
8 if in their view there is a -- a number, a sweetening of the
9 deal that would make it go away. It is my suspicion that
10 there is no number that makes all of them disappear, but it's
11 an issue.

12 And we would propose then to report back to the Court on
13 Friday if that would be amenable to the Court's schedule about
14 what we have achieved with respect to all of those procedural
15 and financial constraints to lay at the front of the Court
16 because I think otherwise we're going to have a series of
17 running hand battles while the -- while witnesses sit here
18 that won't be productive for -- for anyone.

19 And I'm sensible to the fact that it's taken a long time
20 for us all to schedule this. We have a lot of money invested
21 in this -- in this proceeding to date. We're going to see
22 what we can preserve of that. That will also be part of what
23 we are -- what we are talking about.

24 THE COURT: All right. Mr. Hackney.

1 THE COURT: Sure. Sir.

2 MR. HACKNEY: So, Your Honor, I'm going to state
3 what I think the sense of the senate is and perhaps then we
4 can just poll the room and see if any -- if I got it wrong.
5 But I think I -- I think I can say that it is the sense of the
6 objectors that what the city is -- is asking the Court to do
7 is to continue the hearing on its motion until a later date.

8 And I think that the objectors would -- this -- I think
9 the objectors would agree to that continuance. I will note
10 that there has been a lot of money spent getting ready for
11 this hearing to get it done, but whatever things change and we
12 acknowledge that.

13 So -- but I just offer that, you know, agreeing to a
14 continue it I think is -- is a sign of good faith. And I also
15 say the objectors I think are willing to meet with the city
16 and hear the city's ideas about how to handle evidence and
17 discovery and so on and so forth. So we are amenable to that
18 idea.

19 I wanted to offer two -- two points for the Court's
20 consideration. One of them is that I hope the city will think
21 about the fact that it's not clear the extent to which you can
22 change this evidential record with new evidence. So I think
23 that should be a consideration for the city.

24 And I also don't want to -- I'm not backing off what I

1 respect to this deal and -- and I just wanted to reiterate
2 that point.

3 The second one is that having lived under the gun of
4 these deadlines before, I would like the city to make sure
5 that it's expressing our views about process to the folks that
6 are setting these deadlines, whether it's the discount or the
7 expiration of a commitment.

8 I -- you know, it will -- it will be a problem for us if
9 they come back and say Barclays was very accommodating,
10 they've extended it from January 7th to January 9th and so we're
11 going to do all this over the Christmas week. And then we're
12 going to come back on January 2nd and do it again.

13 That's going to be a problem for the objectors, I think.
14 And I want to say that now just so it's not a surprise later.
15 Long way around, if the city is asking for a continuance we
16 would not object to it.

17 We did want to confirm that Friday's hearing would be a
18 -- in the way of a status conference to report to you on
19 progress we've made in sorting this puzzle out. Thank you.

20 THE COURT: Thank you, sir. Mr. Cullen, to -- to
21 the extent I heard you say that you are willing to use the
22 time of any continuance in an attempt to re-negotiate the deal
23 that you are asking me to approve, I would encourage that as
24 strongly as I can.

1 as long as we all have, or in litigation even for that matter
2 knows, that even if -- even if a winning party gets a
3 judgment, they'll take 75%. Do you hear what I'm saying?

4 MR. CULLEN: I understand you, Your Honor.

5 THE COURT: All right. What time on Friday?

6 MR. CULLEN: What time is good for the Court?

7 THE COURT: Well, I'm here, so --

8 MR. CULLEN: 10:00.

9 THE COURT: 10:00, is that all right with everybody?
10 All right. I'll see you then.

11 THE CLERK: All rise.

12 THE COURT: If it's not this room, ladies and
13 gentlemen, one second. If it's not this room, we'll post a
14 notice on ECF, otherwise assume it's this room.

15 MR. SHUMAKER: Thank you, Your Honor.

16 MS. GREEN: Thank you, Your Honor.

17 THE COURT: Court is adjourned.

18 (Court Adjourned at 2:50 p.m.)
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We certify that the foregoing is a correct transcript from the
electronic sound recording of the proceedings in the
above-entitled matter.

/s/Deborah L. Kremlick, CER-4872
Letrice Calloway

Dated: 11-20-13